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ASEAN and Intellectual Property: Will a Complicated History Lead to a Certain Future?

PETER N. FOWLER, TEERIN CHAROENPOT, AND CHEEPCHANOK
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*The future is certain
Give us time to work it out.*

David Byrne¹

I. INTRODUCTION

Southeast Asia is a complicated place.² It has a rich and complex history, and a range of cultural and religious influences, languages, economic concerns, and legal and political systems. Geographically defined as a “sub-region” of Asia, Southeast Asia is bound by the Indian Ocean and the Pacific Ocean, encompasses much of the South China Sea, abuts China in the north and reaches Australia in the south, and stretches from India in the west to New Guinea on its easternmost flank. With a long tradition of maritime-based trade, repeated waves of invasion and conflict, and faced with the challenges of seemingly never-ending natural and human disasters, one would be correct to surmise that attitudes about art, literature, and ownership of intellectual property (IP) might be less than uniform in the region.

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1. DAVID BYRNE, ROAD TO NOWHERE (EMI Records Ltd. 1985).

2. For discussion on historical background, see Brigadier Jameson, *A Short History of South East Asia*, in A SHORT SERIES OF WORLD HISTORY.

The nations generally viewed as constituting Southeast Asia are the member states of the Association of Southeast Asian Nations (ASEAN), namely: the Sultanate of Brunei Darussalam (“Brunei”), the Kingdom of Cambodia (“Cambodia”), the Republic of Indonesia (“Indonesia”), the Lao People’s Democratic Republic (“Laos”), the Federation of Malaysia (“Malaysia”), the Republic of the Union of Myanmar (“Myanmar” or sometimes “Burma”), the Republic of the Philippines (“Philippines”), the Republic of Singapore (“Singapore”), the Kingdom of Thailand (“Thailand”), and the Socialist Republic of Vietnam (“Vietnam”).³ Meanwhile, other countries and territories, such as the Democratic Republic of Timor-Leste, Guam, the Commonwealth of the Northern Mariana Islands, the Republic of Palau, the Independent State of Papua New Guinea, and the Andaman and Nicobar Islands of India, are also geographically grouped as part of Southeast Asia. However, this Article will focus solely on those countries that compose ASEAN and are members of the ASEAN Economic Community (AEC).

II. HISTORY OF ASEAN AND THE CREATION OF THE ASEAN ECONOMIC COMMUNITY (AEC)

ASEAN was established on August 8, 1967, with the signing of the ASEAN Declaration (Bangkok Declaration) by Indonesia, Malaysia, Philippines, Singapore, and Thailand as its founding member states.⁴ Subsequently, Brunei joined in 1984, followed by Vietnam in 1995, Laos and Myanmar in 1997, and Cambodia in 1999.⁵

Historically, the idea of ASEAN was conceived at a time when Thailand was brokering the settlement of a territorial dispute and promoting reconciliation between Indonesia, the Philippines and Malaysia.⁶ The founding four ASEAN states realized that without a regional organizational structure in place, the future of the region and the ability to peacefully resolve any future disputes would remain uncertain.⁷ This general acceptance of the need for a regional organization that facilitates communication and cooperation on matters of security led to the creation of ASEAN.

3. *Overview*, ASS’N OF SOUTHEAST ASIAN NATIONS, <http://asean.org/asean/about-asean/overview/> (last visited Apr. 2, 2017).

4. *Id.*

5. *Id.*

6. *History*, ASS’N OF SOUTHEAST ASIAN NATIONS, <http://asean.org/asean/about-asean/history/> (last visited Apr. 23, 2017).

7. *The Founding of ASEAN*, ASS’N OF SOUTHEAST ASIAN NATIONS (July 9, 2012), <http://asean.org/asean/about-asean/overview>.

With this motivation in mind as the aim and purpose of ASEAN, as laid out in the ASEAN Declaration, the founding four agreed to the goals of accelerating economic growth, social progress, and cultural development in the region; promoting regional peace and stability; promoting active collaboration and mutual assistance; promoting trade; improving their transportation and communications facilities; raising the living standards of their peoples; and maintaining a close and beneficial cooperation with existing international and regional organizations with similar aims and purposes.⁸ Declining to establish a permanent leadership architecture, according to Article 31 of the ASEAN Charter, ASEAN is chaired by an annually rotating chairmanship based on the alphabetical order of the English names of Member States.⁹ A permanent secretariat staff, headquartered in Jakarta, Indonesia, assists and supports the chairmanship.¹⁰ In turn, the chairmanship reaches its decisions through consultation and consensus, guided by the principles of noninterference in internal affairs and the peaceful resolution of conflicts.¹¹

At the end of 2015, ASEAN officially established the ASEAN Economic Community (AEC), to create a single market and production base; to foster a highly competitive region with more equitable economic development; and to become a fully globally-integrated economic region.¹² The AEC intended to make ASEAN a significant economic bloc with a population of more than 622 million people. Once established, its combined economy would be the “seventh-largest economy in the world, with a combined GDP of US \$2.4 trillion, [and] projected to rank as the fourth-largest economy in the world by 2050.”¹³

According to the ASEAN Economic Community Blueprint (“Blueprint”), the AEC would make ASEAN more dynamic and competitive, with new mechanisms and measures to strengthen the implementation of its existing economic initiatives; accelerate regional integration in its priority sectors; facilitate movement of business persons,

8. The ASEAN Declaration (Bangkok Declaration), Bangkok, Ass’n of Southeast Asian Nations, (June 27, 2016) <http://asean.org/the-asean-declaration-bangkok-declaration-bangkok-8-august-1967/>.

9. *Id.*

10. *Id.*

11. Eleanor Albert, *ASEAN: The Association of Southeast Asian Nations*, COUNCIL ON FOREIGN RELATIONS (Sept. 1, 2016), <http://www.cfr.org/asia-and-pacific/asean-association-southeast-asian-nations/p18616>.

12. *About AEC*, INVEST IN ASEAN, <http://investasean.asean.org/index.php/page/view/asean-economic-community/view/670/newsid/755/about-aec.html> (last visited Apr. 2, 2017).

13. Vinayak HV, Fraser Thompson & Oliver Tonby, *Understanding ASEAN: Seven Things You Need to Know*, MCKINSEY & COMPANY (May 2014), <http://www.mckinsey.com/industries/public-sector/our-insights/understanding-asean-seven-things-you-need-to-know>.

skilled labor and talents; and strengthen ASEAN's institutional mechanisms.¹⁴

The Blueprint explicitly recognizes IP as one of the necessary factors in building a competitive economic region. In its initial ASEAN Framework Agreement on Intellectual Property Cooperation, AEC emphasized regional commitments concerning IP protection, administration, and enforcement¹⁵ and since 2004, has articulated specific goals through its periodically-issued ASEAN IPR Action Plans,¹⁶ which will be discussed later in greater detail.

III. COMMITMENTS TO INTELLECTUAL PROPERTY PROTECTION AND ENFORCEMENT

A. Historical, Cultural and Legal Influences

Human beings began settling the Southeast Asian region around 45,000 years ago, moving eastward from the Indian subcontinent. Studies suggest that migration to the region came in two major waves. Austronesian people, who form the majority of the modern population in Indonesia, Malaysia, Brunei, East Timor, and the Philippines, likely migrated from Taiwan, then slowly spread northward in a subsequent migration from the south.¹⁷

The peoples of Southeast Asia have been seafarers for thousands of years. An early maritime trading network ranging from coastal Vietnam to the rest of the Indonesian archipelago existed as early as 5,000 BC, and passage through the Indian Ocean established commerce between East Africa, the Indian subcontinent, and Southeast Asia.¹⁸

As for cultural and religious influences, most indigenous peoples practiced animism until Hinduism from India and Theravada Buddhism from Sri Lanka supplanted it.¹⁹ Prior to the introduction of Islam in the 13th century, Hinduism and Buddhism were the dominant religions in

14. See generally *ASEAN Community Blueprint 2025*, ASS'N OF SOUTHEAST ASIAN NATIONS 2025 (2015).

15. *ASEAN Framework Agreement on Intellectual Property Cooperation*, ASS'N OF SOUTHEAST ASIAN NATIONS INTELL. PROP. PORTAL, <https://www.aseanip.org/About-Us/ASEAN-Framework-Agreement-on-Intellectual-Property-Cooperation> (last visited Apr. 2, 2017).

16. *ASEAN Intellectual Property Rights Action Plan 2011-2015*, ASS'N OF SOUTHEAST ASIAN NATIONS INTELL. PROP. PORTAL, <https://www.aseanip.org/Portals/0/PDF/ASEAN%20IPR%20Action%20Plan%202011-2015.pdf> (last visited Mar. 18, 2017).

17. See generally, *Southeast Asia*, NEW WORLD ENCYCLOPEDIA, http://www.newworldencyclopedia.org/entry/Southeast_Asia (last modified Oct. 13, 2015).

18. *Id.*

19. DYNAMICS OF RELIGION IN SOUTHEAST ASIA, 8, (Volker Gottowik, ed., 2014).

Southeast Asia.²⁰ Yet, much of mainland Southeast Asia remains Buddhist to this day, albeit influenced by the Hindu-influenced Khmer culture. Chinese and Confucian influences in Southeast Asia can be traced to extensive maritime trade by China and northern Vietnam under direct Chinese rule from 111 BC to 938 AD, and a strong cross-border trade between southern Chinese provinces and northern Burmese, Thai, and Lao regions, which continues to expand to this day.²¹

The strategic value of the Strait of Malacca did not go unnoticed by the Chinese, nor by the later arriving Europeans. European contacts with, and colonization of, Southeast Asia began in the 16th century, with the arrival of the Portuguese in Malacca, Maluku, and the Philippines.²² The Spanish ruled the Philippines for centuries until it ceded the region to the United States at the end of the Spanish-American War with the signing of the Treaty of Paris in December 1898.²³

For most countries in Southeast Asia, the Western concept of IP as privately-owned assets had no basis in cultural or religious traditions.²⁴ Instead, encounters with European traders and commercial practices often marked their first exposure to these ideas and IP laws.²⁵ Throughout the 17th and 18th centuries – as the Dutch established the Dutch East Indies; the French came to dominate Indochina; and the British established the Strait Settlements in Singapore, later annexing Burma into the British Raj – European legal and commercial exposure grew in the Southeast Asian region but was rarely applied to local legal and commercial regimes. IP laws, even when imposed, were viewed as something foreign to local law and custom, and were often left to be administered from European capitals.²⁶

By the end of the 19th century, all Southeast Asian countries were colonized by Western countries, with the exception of Thailand (then the

20. See generally, William H. Frederick & Thomas R. Leinbach, *Southeast Asia*, ENCYCLOPÆDIA BRITANNICA, <https://www.britannica.com/place/Southeast-Asia#toc52766> (last updated Oct. 18, 2015).

21. See generally Peter K. Yu, *International Intellectual Property Scholars Series: Intellectual Property and Asian Values*, 16 MARQ. INTELL. PROP. L. REV. 329 (2012).

22. See Dr. Constance Wilson, *Colonialism and Nationalism in Southeast Asia*, SEASITE, <http://www.seasite.niu.edu/crossroads/wilson/colonialism.htm>; see also *Philippines, History, The Spanish Period*, ENCYCLOPÆDIA BRITANNICA, <https://www.britannica.com/place/Philippines/The-Spanish-period> (last updated Apr. 4, 2017).

23. See *Philippines, History, The 19th Century*, ENCYCLOPÆDIA BRITANNICA, <https://www.britannica.com/place/Philippines/The-19th-century> (last updated Apr. 4, 2017).

24. Carolyn Deere, *Developing Country Perspectives on Intellectual Property in the WTO: Setting the Pre-TRIPS Context*, in RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY LAW & THE WTO 1, 4 (Carlos Correa & Edward Elgar eds., 2009).

25. *Id.*

26. *Id.*

Kingdom of Siam).²⁷ Still, Thailand was pressured by both the British and the French to cede territory to its Malay states, in what presently constitutes Laos and Cambodia, respectively.²⁸ Only a core of Siamese territory remained under its own rule.²⁹ Western colonization brought with it many things: Christianity, education, science, and political, legal, and organizational influences, including laws to protect copyrights, patents, and trademarks. While the Philippines can point to the longest legal history of IP protection in Southeast Asia, dating to a Spanish decree addressing protection for patents in 1833, colonization did not always result in the automatic imposition of IP laws.

The introduction of IP laws to colonial territories began in earnest, especially by France and Great Britain, following the Congress of Berlin in 1844, which “laid the foundations for an enduring influence on legal development in developing countries and on how law was perceived and understood.”³⁰ Later, the Paris Convention for the Protection of Industrial Property (“Paris Convention”) (1883) and the Berne Convention for the Protection of Literary and Artistic Works (“Berne Convention”) (1886) exposed developing countries to an international regime for IP protection.³¹

B. The Influence of the Dutch Legal System on Indonesia

While the Portuguese were the first Europeans to establish a trade connection with what is now Indonesia, they had no impact on commercial or civil law. Rather, it was the Dutch who influenced the legal system by bringing with them the Roman-Dutch civil law legal system to facilitate trade and protect their political and economic interests in 1596.³² This influence extended more than 350 years, encompassing both a period of exclusive trade by the Dutch East India Company (V.O.C.) starting in 1605, and a period of official colonization by the

27. Wilson, *supra* note 22.

28. See generally THOMAS F. BARTON, ROBERT C. KINGSBURY & GERALD R. SHOWALTER, *SOUTHEAST ASIA IN MAPS* (1970).

29. *Id.*

30. Deere, *supra* note 24, at 4.

31. GABRIEL GALVEZ-BEHAR, *THE 1883 CONVENTION AND THE IMPOSSIBLE UNIFICATION OF INDUSTRIAL PROPERTY. INTERNATIONAL DIVERSITY IN PATENT CULTURES: A HISTORICAL PERSPECTIVE* (2014); CAROLYN DEERE, *THE IMPLEMENTATION GAME: THE TRIPS AGREEMENT AND THE GLOBAL POLITICS OF INTELLECTUAL PROPERTY REFORM IN DEVELOPING COUNTRIES* 37 (2008).

32. See Rey Ty, *Colonialism and Nationalism in Southeast Asia*, SEASITE, http://www.seasite.niu.edu/crossroads/ty/COLONIALISM_%20IN_SE%20ASIA.htm; see also J.M. SMITS, *THE MAKING OF EUROPEAN PRIVATE LAW: TOWARD A IUS COMMUNE EUROPAEUM AS A MIXED LEGAL SYSTEM*, 156-157 (2002).

Netherlands starting in 1825.³³ When the V.O.C. collapsed in 1799, the Dutch Government took over its assets and put Indonesia under its direct administrative authority.³⁴

While the Dutch called Indonesia the Netherlands East Indies, it had not established control over the entire archipelago at the time.³⁵ Most of its legal and political focus was on the islands of Borneo, Celebes, Java, and Sumatra.³⁶ Indeed, for at least the first 200 years or more, the Dutch East India Company was not all that interested in territorial administration, and for the most part, did not deal with or govern the Indonesians directly.³⁷ Rather, it applied codified civil law to Europeans and, to some degree, foreign Orientals, but customary law (“Adat”) and Islamic Sharia law to indigenous peoples.³⁸

While this segregation in the area of commerce, land, family, inheritance, and most of private or civil laws continued throughout the entire period of Dutch control, it began to change when the Dutch assumed territorial administration in the early 1800s.³⁹ However, laws on the protection of patents, trademarks, and copyrighted works were not fully introduced until the early 20th Century.⁴⁰ Following ratification of the Paris Convention and the Berne Convention, the colonial government enacted a Patent Law in 1910, and both a Trademark Law and a Copyright Law in 1912; however, it did not unify the criminal legal system until 1918. Following independence in 1945, national laws gradually replaced the colonial laws on IP rights.⁴¹

C. The Influence of the British Legal System on the Region

The British navy and trading ships approached Southeast Asia from the west; acquired the port city of Penang in 1786; founded Singapore in 1819; and acquired Malacca from the Dutch in 1824.⁴² The British

33. Ty, *supra* note 32.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. ROBERT CRIBB & AUDREY KAHIN, HISTORICAL DICTIONARY OF INDONESIA, 140 (2nd ed. 2004).

39. See Ty, *supra* note 32.

40. The Netherlands abolished its patent law in 1869. See GALVEZ-BEHAR, *supra* note 31, at 3.

41. Following Indonesian independence in 1945, the colonial laws on intellectual property rights were gradually replaced by national laws, with a Law on Commercial Marks enacted in 1961 (subsequently amended new laws in 1992 and 2015); a Copyright Law enacted in 1982 (amended by new laws in 1987 and 2014), and a Patent Law enacted in 1989 (subsequently amended by new laws in 1999 and 2016). *Id.*

42. See Wilson, *supra* note 22.

governed all three as the Straits Settlements from 1826 to 1867, when they became a Crown colony.⁴³ Unlike other colonies which were allowed to keep their ethnic identities and local rulers, the Straits Settlements served as a base of expansion into the Malay Peninsula during three wars with Burma between 1826 and 1888, as part of Britain's efforts to annex it as a province within British India.⁴⁴ In 1909, (Siam) was forced to cede its four Malay States to Britain. Brunei became a British protectorate in 1888.⁴⁵

The British influence and governance in the region lasted until after World War II, when the movement against colonialism gained widespread support following the defeat of Japan, which had occupied all of Great Britain's Far East territories. Burma gained independence in 1948;⁴⁶ the Malay States organized as the independent Federation of Malaysia in 1957, with Penang, Malacca, Sabah, Sarawak, and Singapore joining in 1963;⁴⁷ and Brunei became an independent nation in 1984.⁴⁸

As with most trading nations, the British negotiated and imposed its commercial laws, rules, and practices on its trading partners and new territories as needed to protect its interests but did not establish clear rules concerning the application of its IP law to its colonies; instead, the British generally deferred to local legislation. Indeed, until 1852, Britain had two coexisting modes of IP protection.⁴⁹ Locals could obtain patents either in the United Kingdom or in the colony itself, under applicable local law.⁵⁰ This practice continued until the late 19th century when local IP laws were modeled on, or adapted directly from, existing British laws.⁵¹

As a common law country, Great Britain brought its conception of law and precedent to its colonies through local court systems, thus influencing the understanding and practice of IP and the settlement of legal and commercial disputes. Also, as local legal practitioners went to the United Kingdom for their legal education, they became well-versed

43. *Singapore Attains Crown Colony Status*, HISTORYSG, <http://eresources.nlb.gov.sg/history/events/372a4e72-9f1b-4eb4-9ec6-58cad02000f0>

44. See Ty, *supra* note 32.

45. *Brunei Darussalam: History*, THE COMMONWEALTH, <http://thecommonwealth.org/our-member-countries/brunei-darussalam/history>.

46. See Wilson, *supra* note 22.

47. Singapore was forced to withdraw from the Federation of Malaysia in 1965. See *History of Singapore*, NATIONS ONLINE, <http://www.nationsonline.org/oneworld/History/Singapore-history.htm> (last visited Mar. 19, 2017).

48. *Brunei Darussalam: History*, *supra* note 45.

49. See GALVEZ-BEHAR, *supra* note 31, at 6.

50. *Id.*

51. For discussion on the application of British laws in British colonies, see generally Lionel Bently, *The "Extraordinary Multiplicity" of Intellectual Property Laws in the British Colonies in the Nineteenth Century*, in 12 THEORETICAL INQUIRIES IN LAW 161-200 (December 2011).

on the British legal system, procedures, and practice and incorporated both general and elitist British attitudes about IP rights into local laws and practices upon their return.⁵²

D. The Influence of the French Legal System on the Region

Much like other Europeans, the French arrived in Southeast Asia as maritime traders who were backed by a powerful navy.⁵³ Preoccupied by conflicts in North America and Europe, domestic upheaval and financial difficulties, and the loss of many overseas possessions as a result of unsuccessful wars and alliances, the French focused most of their attention on Caribbean and African possessions, and were a bit late to Southeast Asian colonization.⁵⁴ Despite establishing commercial and diplomatic ties with Thailand (Siam) as early as 1600, the British overshadowed French efforts through its growing influence and territory in India.⁵⁵ Instead, the French went to Vietnam in 1858, seized Saigon in 1859, and annexed Cochin China and Cambodia in 1867.⁵⁶ By 1893, France established protectorates over Annam, Laos, and Tonkin, and threatened Thailand with war and annexation if it did not cede Lao provinces east of the Mekong River and western Cambodia.⁵⁷ To resolve the situation and maintain independence, Thailand ceded the demanded provinces,⁵⁸ later ceding additional land in Laos in 1904 and western Cambodia in 1907, thus creating French Indochina.⁵⁹

Unlike the British, in 1884, the French began to apply civil code laws, including those on IP, through a series of decrees to its colonies,⁶⁰ but reserving all administrative functions and decisions on IP protection with its government bureaucracy in Paris. While it attempted to transplant

52. See DEERE, *supra* note 24, at 4.

53. Ty, *supra* note 32.

54. *Id.*

55. *Id.*

56. For background on French-Thai conflicts, see *Franco-Siamese War 1893*, GLOBAL SECURITY, <http://www.globalsecurity.org/military/world/war/franco-siamese.htm>; see also Lawrence Palmer Briggs, *The Treaty of March 23, 1907 Between France and Siam and the Return of Battambang and Angkor to Cambodia*, 5 THE FAR EASTERN Q. 439, 439-54 (1946).

57. Briggs, *supra* note 56, at 444-446.

58. *Id.*

59. While Thailand regained some of its lost territory as a result of its war with France in 1940-1941, it was forced to again relinquish the territory in 1946 under threat of a French veto to its membership in the United Nations. For a background on this history, see George Horvath, *Thailand's War With Vichy France*, HIST. TODAY (Mar. 1995), <http://www.historytoday.com/george-horvath/thailands-war-vichy-france>.

60. R. Betts & M. Asiwaju, *Methods and Institutions of European Domination*, in 7 AFRICA UNDER COLONIAL DOMINATION 1880-1935, 312-31 (University of California Press, 1985); also Deere, *supra* note 24, at 2.

the organizational structure of French bureaucracy to Indochina, France did so without making significant progress in cultivating indigenous peoples as colonial bureaucrats. Further, while France extended the application of international treaties and conventions to its overseas possessions, and later supported its former colonies in joining such agreements, in many cases, this amounted to mere form than substance.

E. The Many Legal Influences on Vietnam

Almost no single country in Southeast Asia has had more foreign influences on it than the existing legal system in Vietnam. From the teaching of Confucian principles and the imposition of the Chinese Le Code in the 15th Century, to the strong influence of the French civil code and the later imposition of Socialist legal concepts from the Soviet Union,⁶¹ Vietnam has absorbed and reflected such disparate, and not wholly compatible, influences on its current legal system.⁶²

In the mid-1800s, the French introduced respect and legal ownership of IP with a strong emphasis on *droit d'auteur* and the commercial value of patents, which even Karl Marx appreciated.⁶³ The French also brought Vietnam, along with its other colonies in Southeast Asia, into the international IP framework by extending the application of the Berne Convention and the Paris Convention to its overseas territories.⁶⁴

Since its market opening and reforms undertaken by the Vietnamese Government in the mid-to-late 1990s, beginning with the negotiation of bilateral trade agreements with the United States and Switzerland, the enhancement of IP protection and enforcement has taken on an important role in Vietnam's trade relations. Entry into the World Trade Organization (WTO) and the negotiation of multiple trade agreements has only underscored and propelled Vietnam forward in establishing a stronger IP system.

F. The Influence of the United States' Legal System on the Region

Beginning with its acquisition of the Philippines in 1898, and subsequent examination of Philippines patent applications by the United

61. For a more detailed and insightful discussion on the influence of socialist law in Vietnam, see John Gillespie, *Changing Concepts of Socialist Law in Vietnam*, in *ASIAN SOCIALISM AND LEGAL CHANGE* (Australia National University Press, 2005).

62. For a concise overview of the historical, political, and commercial influences on Vietnam, see Andrew L. Odell & Marlene F. Castillo, *Vietnam in a Nutshell: An Historical, Political, and Commercial Overview*, 21 N.Y. ST. B.A. INT'L L. 82-91 (Aug. 2008).

63. See Deere, *supra* note 24.

64. *Id.*

States Patent and Trademark Office (USPTO) according to U.S. patent law,⁶⁵ the United States has influenced the IP laws, administration, and practice of countries in Southeast Asia. Unlike other Western powers' influence on IP laws and practice through the direct application of parent nation laws and judicial decisions, with the exception of the Philippines, the United States' has indirectly impacted IP legislation and court decisions in Southeast Asia.

Arguably, the greatest U.S. legal influence on ASEAN countries has been in trade, where pursuant to various trade agreements, ASEAN countries have made significant changes to their IP legal frameworks and enforcement procedures. These changes are reflected in the World Trade Organization Agreement on the Trade-Related Aspects of Intellectual Property Rights (TRIPs), Trade and Investment Framework Agreements (TIFA),⁶⁶ Bilateral Trade Agreements (BTAs),⁶⁷ and Free Trade Agreements (FTAs).⁶⁸ All of these trade agreements address commitments and obligations in a wide range of IP issues, and intend to expand IP standards or practices in a trading partner's legal system beyond the obligations contained in TRIPs. The extensive engagement and negotiations surrounding the Trans-Pacific Partnership Agreement (TPP), which involved four ASEAN countries – Brunei, Malaysia, Singapore, and Vietnam – also addressed norm settings and a range of substantive and practice-oriented IP protection and enforcement issues.⁶⁹

Arguably, the U.S.'s combined efforts in both the trade agreement area and in technical assistance and capacity-building have significantly helped Southeast Asian countries make substantive changes to their respective intellectual property regimes.

65. *Id.*, at 2.

66. The U.S. maintains TIFAs with ASEAN, and bilaterally with Brunei, Burma, Cambodia, Indonesia, Laos, Malaysia, Philippines, Thailand, and Vietnam. *See generally*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, *Trade & Investment Framework Agreements*, <https://ustr.gov/trade-agreements/trade-investment-framework-agreements> (last visited Apr. 8, 2017).

67. The U.S. entered into BTAs in the past with Cambodia, Laos, and Vietnam prior to their WTO accessions, at which time such BTAs were superseded by WTO commitments. *See* Dean A. DeRosa, U.S. Free Trade Agreements with ASEAN, Institute for International Economics, https://piie.com/publications/chapters_preview/375/06iie3616.pdf (last visited Apr. 8, 2017).

68. The only current FTA that the U.S. has with an ASEAN country is the Singapore-U.S. Free Trade Agreement; *see* Singapore FTA, Off. of the U.S. Trade Rep., <https://ustr.gov/trade-agreements/free-trade-agreements/singapore-fta> (last visited Apr. 8, 2017); negotiations on FTAs with Malaysia and Thailand, respectively, did not result in any agreement.

69. *See, e.g., Berne Convention*, WIKIPEDIA, https://en.wikipedia.org/wiki/Berne_Convention (last visited Apr. 2, 2017).

IV. ACCESSION TO INTERNATIONAL CONVENTIONS AND TREATIES

Country	Burma	Brunei	Cambodia	Indonesia	Laos	Malaysia	Philippines	Singapore	Thailand	Vietnam
Berne		2006		1997	2011	1990	1950	1998	1931	2004
Rome			1961				1984			2006
Paris		2012	1998	1950	1998	1988	1965	1994	2008	1949
WCT/WPPT		2017/ 2017		2002/2005		2012/ 2012	2002/2002	2005/2005		
PCT		2012	2016	1997	2006	2006	2001	1994	2009	1992
Madrid		2017	2015		2015		2012	2000	2017	2006
Hague		2013	2017					2005		
UPOV								2004		2006
WIPO	2001	1994	1995	1979	1995	1988	1980	1990	1989	1976
Others		Budapest: 2012	Marrakesh: 2013	Marrakesh: 2013 TM Law Treaty: 1997		Vienna: 2007	Budapest: 1981	Brussels: 2005 Budapest: 1994 Marrakesh: 2016 Singapore TM: 2009		Brussels: 2006

A. Berne Convention for the Protection of Literary and Artistic Works

The Berne Convention “is an international agreement governing copyright, which was first accepted in Berne, Switzerland, in 1886.”⁷⁰ It “mandated several aspects of modern copyright law, it introduced the concept” that copyright protection must not be conditioned upon compliance with any formality, and requiring that countries recognize copyrights held by citizens of all other signatory countries.⁷¹

Prior to their individual accession and implementation of the Berne Convention, some countries, including Malaysia, Myanmar, Singapore, and Thailand, had copyright laws in place based on, or developed under,

70. *Id.*

71. *Id.*

the influence of the British Copyright Act,⁷² the Dutch Copyright Law⁷³ in the case of Indonesia, or the United States Copyright Act in the case of the Philippines. While Cambodia and Myanmar have yet to accede, “under the Agreement on Trade-Related Aspects on Intellectual Property Rights (TRIPs, Agreement), the principles of national treatment, automatic protection and independence of protection also bind those WTO members not party to the Berne Convention.”⁷⁴

While not relevant to international commitments by WTO member states, some Southeast Asian states, including Cambodia, Laos, and the Philippines, joined the Universal Copyright Convention⁷⁵ as an alternative for those states which disagreed with aspects of the Berne Convention, like the United States and the Soviet Union. While still a convention administered by the United Nations Education, Scientific, and Cultural Organization (UNESCO), it is now considered an artifact within the copyright world.

B. Paris Convention for the Protection of Industrial Property

Adopted in 1883, “the Paris Convention applies to industrial property in the widest sense, including patents, trademarks, industrial designs, utility models, service marks, trade names, geographical indications, and the repression of unfair competition.”⁷⁶ One of its key principles is the right of priority in the case of patents (and utility models where they exist), marks, and industrial designs.⁷⁷ The right of priority reflects the principle that when a regular first application is filed in one of the Contracting States, the applicant may, within a certain period of time, apply for protection in any of the other Contracting States.⁷⁸ “This helps applicants by giving them a grace period of six or twelve months to

72. The Copyright Act of 1911 came into force on July 1, 1912 as an Act of the Parliament of the United Kingdom (UK); it established copyright law in the UK, which applied or extended to all parts of the British Empire. See *Copyright Act 1911*, WIKIPEDIA, www.en.wikipedia.org/wiki/Copyright_Act_1911 (last visited Apr. 2, 2017).

73. See *Copyright Law of Indonesia*, WIKIPEDIA, https://en.wikipedia.org/wiki/Copyright_law_of_Indonesia (last updated Apr. 24, 2016).

74. See *Summary of Berne Convention for the Protection of Literary and Artistic Works* (1886), WORLD INTELL. PROP. ORG., http://www.wipo.int/treaties/en/ip/berne/summary_berne.html (last visited Apr. 2, 2017).

75. See *Universal Copyright Convention* (Sept. 6, 1952), http://portal.unesco.org/en/ev.php-URL_ID=15381&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited Apr. 8, 2017).

76. *Summary of the Paris Convention for the Protection of Industrial Property* (1883), WORLD INTELL. PROP. ORG., http://www.wipo.int/treaties/en/ip/paris/summary_paris.html (last visited Apr. 2, 2017).

77. *Id.*

78. *Id.*

decide in which countries to seek protection, and to organize with due care the steps necessary for securing protection.”⁷⁹

The Paris Convention was mentioned in the first ASEAN Intellectual Property Rights Action Plan, adopted in 2004, as one of the international treaties that member states should consider for accession.⁸⁰ Only Brunei, Myanmar, and Thailand had not joined at that time whereas Vietnam did so in 1949.⁸¹ At present, only Myanmar has yet to accede to it.⁸²

C. Other Intellectual Property Conventions and Treaties

The development of national or regional legal and policy infrastructures that address evolving demands of the IP landscape and participation in global IP systems is one of the strategies stated in the ASEAN Intellectual Property Rights Action Plan 2011-2015.⁸³ Besides the key international treaties on IP, such as Berne or Paris, ASEAN countries have mutually agreed to accede to the Patent Cooperation Treaty (PCT), the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (“Madrid Protocol”), and the Hague Agreement Concerning the International Registration of Industrial Designs (“Hague Agreement”).⁸⁴ These treaties ensure rights holders in Contracting Parties are able to seek IP protection throughout the world by filing an “International Application” through a national IP office within their respective countries.⁸⁵

Excluding Myanmar, which is not a member of any WIPO-administered IP convention, and the World Intellectual Property Organization (WIPO) Convention itself, all ASEAN members have acceded to and implemented the PCT. Further, all have passed the legislation necessary to implement the Madrid Protocol but only

79. *Id.*

80. See *ASEAN Intellectual Property Resources Action Plan 2004-2010*, ECAP III, <http://www.ecap-project.org/resources/asean-ipr-action-plan-2004-2010> (last visited Apr. 2, 2017).

81. See Administered Treaties, Contracting Parties – Paris Convention, WORLD INTEL. PROP. ORG., http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=2.

82. *Id.*

83. See *ASEAN Intellectual Property Rights Action Plan 2011-2015*, *supra* note 16.

84. Bienvenido “Nonoy” Oplas, Jr., Case Study: Property Rights Protection in 6 ASEAN Countries – Singapore, Malaysia, Thailand, Philippines, Indonesia and Vietnam (“Case Study on ASEAN Countries”) (The International Property Rights Index 2016), <https://s3.amazonaws.com/ipri2015/ASEAN+Case+Study1.pdf>.

85. See *How to file an international application: From application to registration*, World Intellectual Property Organization, http://www.wipo.int/madrid/en/how_to/file/registration.html.

Indonesia, Malaysia, and Thailand, have actually acceded to it.⁸⁶ Presently, Brunei, Cambodia, and Singapore have expressly acceded to the Hague Agreement whereas other ASEAN states have only done so impliedly as one of the commitments under ASEAN's IPR Action Plan 2016-2021.⁸⁷

V. REGIONAL COMMITMENTS TO INTELLECTUAL PROPERTY PROTECTION AND ENFORCEMENT

A. ASEAN Framework Agreement on Intellectual Property

Within ASEAN, states have formally recognized the important role of IP rights in the context of trade and investment flow, and the importance of cooperation in IP-related fields in the region. On December 15, 1995, the governments of Brunei, Indonesia, Malaysia, Philippines, Singapore, Thailand and Vietnam, signed the ASEAN Framework Agreement on Intellectual Property Cooperation.⁸⁸ As Professor Christoph Antons noted, the Framework Agreement represented a rather ambitious set of ultimate goals⁸⁹ and was intended to foster closer cooperation among the Member States, including the exploration of the possibility of establishing ASEAN regional patent and regional trademark systems, an ASEAN patent and trademark office, and an ASEAN Intellectual Property Association.⁹⁰

While this landmark agreement provided a framework for a regional commitment to a stronger and more unified IP system, it is fair to say that its full potential has yet to be realized. Indeed, despite its stated commitment to create a single regional IP administration for industrial property, ASEAN has not gained much traction in the ensuing decades. Instead, it has been either informally shelved or disregarded by the Working Group on Intellectual Property Cooperation (AWGIPC) as a realistic goal due to the entrenched opposition of some Member States defending their own revenue interests.⁹¹ Furthermore, Member States

86. *The Madrid Protocol – Coming Soon to Indonesia and Thailand*, ROUSE MAG. (July 29, 2016), <http://www.rouse.com/magazine/news/the-madrid-protocol-coming-soon-to-indonesia-and-thailand/?tag=Indonesia>.

87. *Possible Roadmap for Accession of Viet Nam to the Hague Agreement*, 8 WIPO (March 2, 2016), http://www.wipo.int/edocs/mdocs/aspac/en/wipo_id_han_16/wipo_id_han_16_t1.pdf; The ASEAN Intellectual Property Rights Action Plan: 2016-2025, ASEAN-IPA Annual Meeting & Conference (March 4-6 2016).

88. ASEAN Framework Agreement On Intellectual Property, *supra* note 15.

89. Christoph Antons, *Intellectual Property Law in Southeast Asia: Recent Legislative and Institutional Developments*, 1J. INFO, L. & TECH. 1, 1-11 (2006).

90. ASEAN Framework Agreement on Intellectual Property Cooperation, *supra* note 15.

91. Antons, *supra* note 90, at 1-11.

have resisted actual proposals to establish a single trademark or patent office, resulting in “a less ambitious agenda with the focus for the time being on simplifying and harmonizing national procedures and creating opportunities for enhanced cooperation.”⁹²

B. ASEAN Intellectual Property Action Plans

Since the Framework Agreement on Intellectual Property Cooperation has laid the foundation for greater cooperation, the ASEAN Working Group on Intellectual Property Cooperation has, in the intervening years, adopted a series of five-year Action Plans with a stated intent to further the advancement of intellectual property in the region systematically.⁹³ The first actions taken in this regard were the ASEAN Intellectual Property Action Plan 2004-2010 and the Work Plan for ASEAN Cooperation on Copyrights adopted in 2004.⁹⁴

The Action Plan 2004–2010 was created at a time when the world was seeing rapid progress in technological advancement, especially in information and communications technology, and IP rights were a significant source of business advantage and competitiveness. The first action plan sought to help accelerate the pace and scope of IP asset creation and commercialization inside and outside ASEAN, and to develop and harmonize an enabling IPR registration, protection, and enforcement framework of policies and institutions in the region.⁹⁵ It also stated a commitment to create improved IP awareness and further empower national IP Offices with enhancing cooperative Business Development Services (BDS).⁹⁶

Under the ASEAN IPR Action Plan 2004-2010, programs and projects can be separated into two areas. First is the assessment of needs for all national IP offices and the creation of roadmaps for BDS collaboration in provision.⁹⁷ Second is the design of activities to enhance the efficiency, effectiveness, and sustainability of IP-related BDS, especially those that can be shared and replicated on a regional basis.⁹⁸

92. *Id.* at 9.

93. *ASEAN Intellectual Property Rights*, ASEAN ECONOMIC COMMUNITY MYANMAR PERSPECTIVE, <http://www.aec.com.mm/download/ASEAN%20Intellectual%20Property%20Rights.pdf> (last visited 4/6/2017).

94. *Id.*

95. *See ASEAN Intellectual Property Resources Action Plan 2004-2010*, ECAP III, <http://www.ecap-project.org/resources/asean-ipr-action-plan-2004-2010> (last visited Apr. 2, 2017).

96. *Id.*

97. *Id.*

98. *Id.*

The second adopted ASEAN IPR Action Plan 2011-2015 was influenced by the then-anticipated ASEAN economic integration that was to transpire with the creation of the AEC at the end of 2015. This Action Plan was viewed as part of the AEC Blueprint and thus intended to meet AEC goals by transforming ASEAN into an innovative and competitive region through the effective utilization and commercialization of IP.⁹⁹ It identified five strategic goals that would contribute to the collective transformation of ASEAN into a competitive region:

- Strategic Goal 1: A balanced IP system that takes into account the varying levels of development of Member States and differences in the institutional capacity of national IP Offices to enable them to deliver timely, quality, and accessible IP services to promote the region as being conducive to the needs of users and generators of IP.
- Strategic Goal 2: Developed national or regional legal and policy infrastructures that address evolving demands of the IP landscape and AMSs participate in global IP systems at the appropriate time.
- Strategic Goal 3: The interests of the region are advanced through systematic promotion for IP creation, awareness, and utilization to ensure that IP becomes a tool for innovation and development; support for the transfer of technology to promote access to knowledge; and with considerations for the preservation and protection of indigenous products and services and the works of their creative peoples in the region.
- Strategic Goal 4: Active regional participation in the international IP community and with closer relationships with dialogue partners and institutions to develop the capacity of Member States and to address the needs of stakeholders in the region.
- Strategic Goal 5: Intensified cooperation among AMSs and an increased level of collaboration among them to enhance human and institutional capacity of IP Offices in the region.¹⁰⁰

Today, more than thirteen years since the first Action Plan was adopted, the AEC is a reality, if not yet a full-blown success. Yet, most observers agree that ASEAN continues to face a range of challenges which prevent it from becoming a more competitive region.¹⁰¹ The new

99. *Id.*

100. *ASEAN Intellectual Property Rights Action Plan 2011-2015*, ASS'N OF SOUTHEAST ASIAN NATIONS INTELL. PROP. PORTAL, <https://www.aseanip.org/Portals/0/PDF/ASEAN%20IPR%20Action%20Plan%202011-2015.pdf> (last visited Mar. 18, 2017).

101. See, e.g., Byron Ramirez and Anchalee Pooittiwong, ASEAN Economic Integration: Opportunities and Challenges that Lie Ahead, *International Policy Digest* (Jan. 6, 2016),

issues being discussed for inclusion in the ASEAN IPR Action Plan 2016-2025 are intended to create a more robust ASEAN IP system. This would be accomplished by strengthening national IP Offices and building IP infrastructure in the region, creating regional IP platforms and infrastructures to enhance AEC, creating an expanded and inclusive developed ASEAN IP Ecosystem and regional mechanisms to promote asset creation and commercialization.¹⁰²

C. ASEAN Working Group on IP Cooperation Enforcement Initiatives

The ASEAN AWGIPC, established in 1996, pursuant to the ASEAN Framework Agreement on Intellectual Property Cooperation, serves as a consultative body for ASEAN on IP issues, and as the primary source for technical assistance, training, and capacity-building cooperation with foreign donor and international agencies.¹⁰³ It is composed of the heads of the national IP offices of the ASEAN Member States¹⁰⁴ and is mandated to develop, coordinate and implement all IP-related programs and activities in the region.

The AWGIPC is aware that, apart from better legislation and capacity of the national IP offices, enforcement plays a major role in making sure that IP rights are protected. Therefore, many of the capacity-building programs conducted are enforcement focused, including civil border measures; criminal and administrative enforcement activities; publically available, statistics on IP enforcement; and the increased involvement of IP stakeholders in anti-infringement and information awareness campaigns.¹⁰⁵ The recent adoption of an ASEAN Initiative on Enforcement (ANIEE) underscores the increasing importance the AWGIPC has on strengthening the enforcement capacities of its Member

<https://intpolicydigest.org/2016/01/06/asean-economic-integration-opportunities-and-challenges-that-lie-ahead/>; Sanchita Basu Das, Huge Challenges Await AEC 2025, ISEAS Yusof Ishak Institute Perspective (Issue No. 48 2016), https://www.iseas.edu.sg/images/pdf/ISEAS_Perspective_2016_48.pdf; Ji Xianbai, Why the ASEAN Economic Community Will Struggle, The Diplomat (Sept. 24, 2014), <http://thediplomat.com/2014/09/why-the-asean-economic-community-will-struggle/>; Joshua Kurlantzick, ASEAN's Future and Asian Integration, Council on Foreign Relations (Nov. 2012), https://www.cfr.org/sites/default/files/pdf/2012/10/IIGG_WorkingPaper10_Kurlantzick.pdf.

102. *Id.*

103. These consist, at present, of the following: IP Australia; the European Union, European Patent Office, and European Intellectual Property Office; the Japan Patent Office and Japan External Trade Organization; Korean Intellectual Property Office; United States Patent and Trademark Office; and the World Intellectual Property Organization. *See About Us*, ASS'N OF SOUTHEAST ASIAN NATIONS INTELL. PROP. PORTAL, <https://www.aseanip.org/About-Us/About-AWGIPC> (last visited Apr. 2, 2017).

104. *Id.*

105. *See ASEAN Intellectual Property Rights Action Plan 2011-2015*, *supra* note 16.

States by facilitating and supporting cross-border enforcement activities, information sharing, and cooperation on transnational intellectual property criminal activity.

VI. EXTERNAL INFLUENCES ON INTELLECTUAL PROPERTY DEVELOPMENT

A. World Trade Organization TRIPs Council

The WTO Council for Trade-Related Aspects of Intellectual Property Rights (“TRIPs Council”) monitors the implementation of the TRIPs Agreement, which in turn sets minimum standards of protection for copyrights, trademarks, geographical indications (GIs), industrial designs, patents, integrated circuit layout designs, and undisclosed information.¹⁰⁶ TRIPs also establishes minimum standards for the enforcement of IP rights through civil actions for infringement, actions at the border and, at least in regard to copyright piracy and trademark counterfeiting, criminal actions.¹⁰⁷

Similarly, the TRIPs Council is the body responsible for administering and monitoring the TRIPs Agreement, and is open to all WTO members.¹⁰⁸ It provides an open forum in which WTO members can consult on IP matters; carries out the specific responsibilities assigned to it, in particular monitoring the operation of the Agreement (Article 68); and periodically meets in “special sessions,” used for negotiations on a multilateral system for notifying and registering geographical indications for wines and spirits, under the Doha Development Agenda.¹⁰⁹ The TRIPs Council files an annual report to the WTO General Council where it has great latitude and flexibility to address and discuss a range of IP issues, concerns, and developments.¹¹⁰

B. World Intellectual Property Organization

As members of WIPO, ASEAN member states are encouraged to improve and enhance their national IP systems in several ways. WIPO conducts a wide range of technical assistance activities on IP legislation, national IP office administration, and effective practices in enforcement

106. *Council for Trade-Related Aspects of Intellectual Property Rights*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, <https://ustr.gov/trade-agreements/wto-multilateral-affairs/-world-trade-organization/council-trade-related-aspects-in> (last visited Apr. 8, 2017).

107. *Id.*

108. *Id.*

109. Trade Related Aspects of Intellectual Property Rights, WTO, <https://ustr.gov/trade-agreements/wto-multilateral-affairs/-world-trade-organization/council-trade-related-aspects-in>

110. Work of the TRIPs Council, WTO, https://www.wto.org/english/tratop_e/trips_e/intel6_e.htm

of IP rights, and assists developing countries create and implement strategies and policies to create, protect, manage, and exploit IP for economic, social, and cultural development.¹¹¹ Its assistance is intended to help countries integrate IP into overall national development and public policy in a variety of areas, such as health, trade, education, research, technology transfer, and competition policies, including advising countries on the flexibilities available under international IP treaties and the TRIPS Agreement.¹¹² WIPO activities with developing and least developing countries include:

- Training in awareness-building and human resources development for IP officials in LDCs;
- Assistance in building up or upgrading IP offices in LDCs with adequate institutional infrastructure and resources, qualified staff, modern management techniques and access to information technology support systems;
- Advisory missions to IPS offices in LDCs to give advice on modernizing management systems and streamlining administrative procedures;
- Sponsoring study visits for officials from the LDCs;
- Organizing study tours for officials from many LDCs to offices in industrialized countries' to study various aspects of modernization;
- Assisting LDCs with legislation in the areas of industrial property, copyright and neighboring rights and geographic information system (GIs), and enabling the countries to assess the conformity of their existing national legislation vis-à-vis the provisions of international agreements and build national IP organizations and institutions;
- Advising in the setting-up or strengthening of collective management societies in the LDCs;
- Organizing, in close cooperation with other international organizations, national, regional and interregional meetings for the LDC's on integrating IP into national development policy; and
- Assisting LDCs in the establishment of the Intellectual Property Advisory Services and Information Centre.¹¹³

111. *Inside WIPO*, WIPO, <http://www.wipo.int/about-wipo/en/>.

112. Flexibilities in the Intellectual Property System, WIPO, <http://www.wipo.int/ip-development/en/agenda/flexibilities/>.

113. United Nations Secretary-General, Feasibility Study for a United Nations Technology Bank for the Least Developed Countries, <https://sustainabledevelopment.un.org/content/documents/2106Feasibility-Study-for-a-United-Nations-Technology-Bank-for-the-Least-Developed-Countries.pdf>.

All ASEAN member states have at various times, and to various degrees, benefitted from WIPO activities and technical assistance, including legislative analysis, review, and comments, expert assistance with international IP treaty accession and implementation, and the ongoing support for public outreach and education of consumers and rights holders about IP issues. The establishment and operation of a WIPO Singapore Office that focuses on the ASEAN region, and is staffed by experienced IP professionals, has increased the direct influence and level of support it provides in the ASEAN region.¹¹⁴

Two recent examples are instructive. First, Cambodia has been involved in twenty-seven programs organized by WIPO in 2012, including a WIPO “deployment mission on the upgrade of WIPO [Industrial Property Automation System] (IPAS) systems [...] and an advisory mission to develop a Collective Management Office,” as well as assisting Cambodia “to finalize the draft of articles of association relating to the formation and legal structure of a multi-rights society and other issues related to it.”¹¹⁵

The Philippines has also benefitted from WIPO assistance; for example, WIPO will provide it assessment missions, research, and data collection and analysis.¹¹⁶ This will allow the Philippines to develop a “national IP strategy in consultation with stakeholders and as appropriate to its national and economic circumstances including its legal environment, market conditions, available organizational support, and level of public awareness.”¹¹⁷

Apart from the bilateral assistance, since 2009, WIPO has published the Annual World Intellectual Property Indicator Report which gives a detailed and comprehensive view of the current state of utilization of different forms of IP rights worldwide.¹¹⁸ “The statistical indicators provided in this report allow users to analyze and monitor the latest trends in IP activity based on objective and detailed information.”¹¹⁹ They also

114. *WIPO Singapore Office*, WIPO, <http://www.wipo.int/about-wipo/en/offices/singapore/>

115. *Factual Overview on Technical & Financial Cooperation for LDCs Related to TRIPS*, SAANA CONSULTING 55, 69-70, https://www.wto.org/english/tratop_e/trips_e/ldc_overview_08.05.2013_ch5.pdf (last visited Apr. 3, 2017).

116. *See PH to Develop National Strategy for Intellectual Property*, INTELL. PROP. OFFICE OF THE PHILIPPINES, <http://www.ipophil.gov.ph/releases/archive-2015/387-ph-to-develop-national-strategy-for-intellectual-property>.

117. *Id.*

118. *See* WIPO, *World Intellectual Property Indicators – 2009*, WORLD INTELL. PROP. ORG. (2009), <http://www.wipo.int/publications/en/details.jsp?id=188&plang=EN>.

119. *Id.*

contribute to discussions to the formulation of effective IP policies by addressing a wide range of public policy concerns.”¹²⁰

C. United States

As noted above, in connection with the provision of technical assistance, training, and capacity building, the United States has influenced the ASEAN legal regimes and IP offices. In addition to the activities of the USPTO, other U.S. agencies have a history of involvement in ASEAN by providing a very wide range of assistance for improvements in both the operation of the ASEAN Secretariat and national IP regimes, laws, offices, and enforcement systems.¹²¹ These include, among others, the United States Agency for International Development (USAID), the U.S. Department of Commerce, the U.S. Department of Homeland Security, the U.S. Department of Justice, and the U.S. Department of State. The United States has also maintained a Regional Intellectual Property Attaché for Southeast Asia, based at the U.S. Embassy in Bangkok, Thailand, since 2006.¹²²

In addition, the U.S. Government conducts two annual reviews of the IP regimes, enforcement environments, and barriers to market access of U.S. trading partners, culminating in annually published reports to the U.S. Congress.¹²³ When delivering these reports, the Office of the United States Trade Representative (USTR) includes input from all interested U.S. Government agencies, U.S. embassies, and interested stakeholders – e.g., trade associations, the business community, individual IP rights holders, and foreign governments.¹²⁴

The Special 301 Report is the result of an “extensive multi-stakeholder process”:¹²⁵ and in the U.S.’s view, “serves a critical function

120. *Id.*

121. *Association of Southeast Asian Nations*, OFF. OF THE U.S. TRADE REP., <https://ustr.gov/countries-regions/southeast-asia-pacific/association-southeast-asian-nations-asean>.

122. *See generally*, *U.S.-ASEAN Connect: Strategic Partners for Sustainable and Innovative Economic Growth*, USAID, <https://www.usaid.gov/asia-regional/fact-sheets/us-asean-connect> (last visited Apr. 23, 2017).

123. *See Intellectual Property Rights (IPR) Attaché Program*, USPTO.GOV, <https://www.uspto.gov/ip/global/attache/> (last visited Apr. 23, 2017).

124. *See generally*, *Intellectual Property: U.S. Efforts have Contributed to Strengthened Laws Overseas, but Significant Enforcement Challenges Remain*, U.S. GOV'T ACCOUNTABILITY OFF., (Jun. 14, 2005) <https://www.gpo.gov/fdsys/pkg/GAOREPORTS-GAO-05-788T/html/GAOREPORTS-GAO-05-788T.htm>; *See Reports and Publications*, OFF. OF THE U.S. TRADE REP., <https://ustr.gov/about-us/policy-offices/press-office/reports-and-publications> (last visited Apr. 23, 2017).

125. *See 2010 Special 301 Hearing*, OFF. OF THE U.S. TRADE REP., <https://ustr.gov/issue-areas/intellectual-property/Special-301> (last visited Apr. 2, 2017). The Special 301 Report is the result of an annual review of the state of intellectual property rights (IPR) protection and

by identifying opportunities and challenges facing U.S. innovative and creative industries in foreign markets and by promoting job creation, economic development, and many other benefits that effective IPR protection and enforcement support.”¹²⁶ “The Report informs the public and our trading partners and seeks to be a positive catalyst for change,” and reflects the U.S. resolve to encourage and maintain “enabling environments for innovators” through “effective IPR protection and enforcement in worldwide” markets that not only benefit U.S. exporters, but also domestic IP-intensive industries in foreign markets.¹²⁷

The Report categorizes countries into three groups – (1) priority foreign countries (PFCs), (2) priority watch list (PWL) or watch list (WL), and (3) special mention – and identifies “a wide range of concerns” that limit innovation and investment, including:

- (a) The deterioration in the effectiveness of IPR protection and enforcement and overall market access for persons relying on IPR in a number of trading partner markets;
- (b) Reported inadequacies in trade secret protection [in countries around the world, as well as an increasing incidence of trade secret misappropriation];
- (c) Troubling “indigenous innovation” policies that may unfairly disadvantage U.S. rights holders in markets abroad;
- (d) The continuing challenges of copyright piracy and the sale of counterfeit trademarked products on the Internet;
- (e) Additional market access barriers, including nontransparent, discriminatory or otherwise trade-restrictive, measures that appear to impede access to healthcare and copyright-protected content; and
- (f) Ongoing, systemic IPR enforcement issues [at borders and] in many trading partner markets around the world.¹²⁸

The United States uses the review process and resulting reports to improve the environment for IP rights holders, industry sectors, and exporters around the world by focusing on the issues addressed and establishing constructive cooperation with trading partners identified in the Report.¹²⁹

enforcement in U.S. trading partners around the world, which the Office of the United States Trade Representative (USTR) conducts pursuant to Section 182 of the Trade Act of 1974, as amended by the Omnibus Trade and Competitiveness Act of 1988, the Uruguay Round Agreements Act, and the Trade Facilitation and Trade Enforcement Act of 2015 (19 U.S.C. § 2242).

126. OFF. OF THE U.S. TRADE REP, 2016 SPECIAL 301 REPORT, <https://ustr.gov/sites/default/files/USTR-2016-Special-301-Report.pdf>.

127. *Id.*

128. *Id.*

129. *Id.*

Another notable annual report is the Notorious Markets List, which started as an Out-of-Cycle review of the Special 301 Report in 2006.¹³⁰ Through the Notorious Markets List, the USTR identifies particularly infamous physical and online markets that reportedly deal or purvey pirated and counterfeit goods.¹³¹ It does not purport to be an exhaustive list of such markets, rather a highlighting of the worst of the worst. “Nor does it reflect findings of legal violations or the U.S. Government’s analysis of the general IPR protection and enforcement climate in the country concerned; such analysis is contained in the annual Special 301 Report.”¹³² “Instead, the Notorious Markets List was developed by U.S. Government agencies represented on the USTR-chaired Special 301 Subcommittee of the Trade Policy Staff Committee (TPSC) based on information received in response to the *Federal Register* request.”¹³³

“In 2010, the Obama Administration announced that it would elevate the profile of the Notorious Markets List by publishing it separately from the Special 301 Report, to increase public awareness of the dangers presented by such markets and to guide related trade and other enforcement actions.”¹³⁴ The first stand-alone Notorious Markets List was published in February 2011, as an “Out-of-Cycle Review of Notorious Markets”, and has continued to be published annually.¹³⁵

Some critics of these efforts highlight the perceived or alleged shortcomings of U.S. trading partners, including Electronic Frontier Foundation¹³⁶ and Public Knowledge.¹³⁷ While some emphasize the need to change the way these annual reviews are conducted, others have called for its complete abandonment, describing the Lists as meaningless and even counter-productive.¹³⁸

Whether such assessments and lists are effective in moving the needle, so to speak, and influencing U.S. trading partners to make changes to their IP and legal systems, it is a matter of both conjecture and anecdotal evidence. Since the Special 301 Report is mandated by the

130. See 2016 Notorious Markets List Spotlights Fight against Global Piracy and Counterfeiting of American Products, OFF. OF THE U.S. TRADE REP. (Dec. 2006), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2016/december/2016-notorious-markets-list>.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. See generally ELECTRONIC FRONTIER FOUND., <https://www EFF.ORG>.

137. See generally PUB. KNOWLEDGE, <https://www PUBLICKNOWLEDGE.ORG>.

138. See, e.g., Mike Masnick, *Time To Change (Or Ditch) The USTR Special 301 Process That Pressures Other Countries To Adapt US IP Laws*, TECH DIRT (Feb. 19, 2010, 4:34 PM), <https://www.techdirt.com/articles/20100219/0130078234.shtml>.

Trade Act of 1974,¹³⁹ which authorizes USTR “to identify foreign countries that deny adequate and effective protection of IPR or fair and equitable market access to U.S. persons that rely on IP protection,” such reports are both appreciated and supported by a host of IP stakeholders and business organizations, ranging from the International Intellectual Property Alliance, with its member associations representing the major U.S. copyright-intensive trade associations, to the U.S. Chamber of Commerce.¹⁴⁰ Thus, there is little to no likelihood that such assessments and reports will be voluntarily abandoned as tools to assess and influence foreign governments in improving their IP regimes.

D. The European Commission

The European Commission (EC), on behalf of the European Union (EU), works to fight piracy and counterfeiting, and aims to help businesses, especially small businesses, access and use IPR more effectively.¹⁴¹ It also seeks to encourage its trading partners to respect IPR, as this contributes to their economic development.¹⁴² In 2014, the EU designated a Regional Trade Attaché for Intellectual Property Rights at the Delegation Mission of the European Union to Thailand in Bangkok.¹⁴³

This objective is being pursued in different ways:

- An effective enforcement regime: The EU has adopted a revised *Strategy for the Enforcement of Intellectual Property Rights in Third Countries*,¹⁴⁴ examining the major recent changes in the international IP environment and aims to

139. *Special 301*, INT’L TRADE ADMIN. (Feb. 3, 2017, 2:04 PM), http://www.trade.gov/mas/ian/tradedisputes-enforcement/tg_ian_002102.asp.

140. *USTR Releases Special 301 Report on Protection of American Intellectual Property Rights Across the World*, OFF. OF THE U.S. TRADE REP., <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2016/april/ustr-releases-special-301-report>.

141. *A serious problem for everyone*, EUR. COMMISSION, http://ec.europa.eu/taxation_customs/business/customs-controls/counterfeit-piracy-other-ipr-violations/a-serious-problem-everyone_en.

142. *Free Trade Agreements (FTAs)*, EUR. COMMISSION, http://ec.europa.eu/taxation_customs/business/customs-controls/counterfeit-piracy-other-ipr-violations/international-cooperation_en.

143. *Why Thailand*, U.S. EMBASSY & CONSULATE IN THAI., <https://th.usembassy.gov/business/getting-started-thailand/why-thailand/>; In addition, the French National Institute of Intellectual Property (INPI) has maintained an ASEAN Regional Intellectual Property Advisor at its Embassy in Singapore since 2012, *IPOS welcomes appointment of Regional Advisor for Intellectual Property based in Singapore*, INTELL. PROP. OFF. OF SING., (Nov 14, 20112) <https://www.ipos.gov.sg/MediaEvents/Readnews/TabID/873/articleid/212/Default.aspx>.

144. *Trade, Growth and Intellectual Property*, EUR. COMMISSION (Jan. 7, 2017), http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152643.pdf.

ensure the Commission has the appropriate tools needed to meet these challenges more effectively.

- Multilateral agreements: The EU is part of the World Trade Organization [WTO] and the World Intellectual Property Organization [WIPO] to aims to improve the protection and enforcement of IP rights. The EU was a key supporter of the Agreement on Trade-Related Aspects of Intellectual Property Rights [TRIPS].
- Bilateral trade agreements: The EU is negotiating a series of bilateral trade agreements which aim to include comprehensive IPR chapters. The IPR chapters should as far as possible offer similar levels of IPR protection to that existing in the EU, the EU also aims to take into account the level of development of the countries concerned.
- Other bilateral activities: The Commission engages in regular meetings (such as IP Dialogues, IP Working Groups, etc.) with some priority partner countries around the world on IP matters.
- Plurilateral agreements: The EU was involved in the development of the Anti-Counterfeiting Trade Agreement [ACTA]¹⁴⁵, which aimed to help countries work together to tackle large-scale IPR violations more effectively. [. . .]
- Technical assistance program: focusing on IPR or including an IPR component, intended e.g. to help third countries improve their IPR systems.¹⁴⁶

In accordance with the *Strategy for the Enforcement of Intellectual Property Rights in Third Countries*, the EU has conducted a series of periodic surveys since 2006.¹⁴⁷

The principal objective of the survey is to identify those third countries in which the state of IPR protection and enforcement gives rise to the greatest level of concern, and thereby enabling the Commissions to focus its activities and resources aiming at the improvement of IPR protection worldwide, by establishing an updated list of so-called 'priority countries.'¹⁴⁸

145. The EU Parliament rejected ACTA in July 2012.

146. See *Intellectual Property*, EUR. COMMISSION, <http://ec.europa.eu/trade/policy/accessing-markets/intellectual-property/> (last updated Jul. 4, 2014).

147. *Survey on IPR Protection and Enforcement in Third Countries*, EUR. COMMISSION, http://trade.ec.europa.eu/consultations/?consul_id=147 (last updated Aug. 7, 2017).

148. See *Intellectual Property Enforcement*, EUR. COMMISSION (Apr. 28, 2016), <http://ec.europa.eu/trade/policy/accessing-markets/intellectual-property/enforcement> (In 2014, four countries in ASEAN, namely Indonesia, Philippines, Thailand and Vietnam are in the Priority 3 List).

The EU survey provides information to the EU and its IPR holders on the effectiveness of IPR regimes in countries outside the EU by identifying certain countries where the lack of IP protection and/or enforcement is detrimental to their respective interests.¹⁴⁹ It also “enables rights holders— in particular small and medium-sized firms— to improve their business strategies and operations to protect corporate value in intangibles based on intellectual property they own.”¹⁵⁰ In particular, through the EU survey, IPR holders are “better able to manage risk around their IPR when doing business in or with certain third countries.”¹⁵¹ Lastly, the report benefits other third country authorities by clarifying the EU’s perception of their IPR systems, particularly in regard to potential areas for improvement. The latest survey was conducted in 2014.¹⁵²

In addition, in April 2016, the Organization for Economic Co-operation and Development (OECD) and the European Union Intellectual Property Office (EUIPO) published a report on trade in counterfeit goods.¹⁵³ After collecting and analyzing data from half a million customs seizures around the world, the OECD and EUIPO issued a joint report entitled *Trade in Counterfeit and Pirated Goods: Mapping the Economic Impact*.¹⁵⁴ The report highlights emerging trends, both globally and nationally, and the key industries affected by this illegal activity.¹⁵⁵ It also assesses the quantitative value, scope and trends of this illegal trade.¹⁵⁶

E. The United Kingdom

Long a magnet for maritime trade, Southeast Asia is of growing importance to UK trade and exports, accounting for 15% of its total trade.¹⁵⁷ However, the disparate levels of IP protection and enforcement in the region affect UK IP rights holders and influence their investment in the region. The UK Intellectual Property Office (UKIPO) assists UK IP right holders by “working to improve global IP systems through

149. *Id.*

150. *Id.*

151. *Id.*

152. *See Report on the Protection and Enforcement of Intellectual Property Rights in Third Countries*, EUR. COMMISSION (Jan. 7, 2015), http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153600.pdf.

153. ORGANIZATION FOR ECONOMIC COOPERATION & DEVELOPMENT, PARIS, *TRADE IN COUNTERFEIT AND PIRATED GOODS* (2016).

154. *Id.*

155. *Id.*

156. *Id.*

157. *FORGING AHEAD: UK-ASEAN BUSINESS AFTER BREXIT*, 12 (2016), <https://assets.kpmg.com/content/dam/kpmg/uk/pdf/2016/09/forging-ahead-asean-report.pdf>.

negotiation, direct bilateral engagement, and by providing specific help and advice through [its] IP Attachés,” as laid out in its most recent publication, *Promoting Innovation and Growth: The Intellectual Property Office at Work 2015/2016*.¹⁵⁸ Since 2012, it has maintained a designated Regional Intellectual Property Advisor for Asia, based at British High Commission in Singapore.¹⁵⁹

The UKIPO has been working to create optimal IP frameworks domestically, in Europe and globally. In a position to exit the EU, the UK is able to identify and secure opportunities to improve IP frameworks, for example, by influencing IP chapters within free trade agreements (FTAs) and leading negotiations at WIPO or the WTO.¹⁶⁰ In addition, it will focus more on developing bilateral relationships with its counterparts in high growth and high potential markets, and deploying IP attachés to four key markets: China, India, Brazil, and, since 2011, Southeast Asia. Alongside this role, the UKIPO attachés are important in facilitating the bilateral relationships with host government and IP stakeholders.

Apart from working on policy considerations to help its IPR holders, UK government agencies have published several reports to provide relevant information on protecting IPR overseas.¹⁶¹ However, these reports also draw attention to its counterpart countries concerning their current IPR protection regime. For example, the IP Crime Group, which is funded by the UKIPO, has published its IP Crime Report annually since 2004 to highlight current and emerging threats surrounding counterfeiting and piracy.¹⁶² Furthermore, the UK Department of International Trade also published a series of Overseas Business Risk Reports on a country-by-country basis.¹⁶³ The Reports provide “geopolitical and economic analyses on overseas markets to new and expanding exporters.”¹⁶⁴ “The guides also provide information on potential risks including human rights issues, bribery and corruption, terrorism, criminal activity and intellectual property, while raising.”¹⁶⁵

158. *Promoting Innovation and Growth: The Intellectual Property Office at Work 2015/2016*, INTELL. PROP. OFF. 2 (Sept. 15, 2016), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/552791/innovation-and-growth-report-sept-15-16.pdf.

159. See Bill Russell, *Meet the New IP Attachés*, INTELL. PROP. MAG. 1 (Mar. 5, 2014).

160. *Promoting Innovation and Growth*, *supra* note 159, at 121.

161. *IP Crime Reports*, GOV.UK (Oct. 18, 2016), <https://www.gov.uk/government/collections/ip-crime-reports>.

162. *Id.*

163. *Id.*

164. <https://www.gxpsummit.com/gxpblog/2017/3/27/what-security-resources-are-available-for-smes-looking-to-move-into-a-new-market>

165. *Id.*

IPR protection concerns for UK businesses and investors that are considering exportation or doing business in such countries.¹⁶⁶

F. Japan

The Japan Bank for International Cooperation (JBIC) has conducted a survey on Japanese manufacturers' overseas business operations since 1998.¹⁶⁷ "Its objective is to identify the current trends as well as future outlook of overseas business operations by Japanese manufacturing companies with an extended record of overseas business."¹⁶⁸ The JBIC conducted the survey by sending out a questionnaire to Japanese companies around the world, including ASEAN.¹⁶⁹ The companies answer the questionnaire by raising the issues on IP protection as one of their legal or commercial concerns in conducting a business in an overseas country.¹⁷⁰ For example, in the 2016 survey, 45.5% of the companies surveyed raised concerns on the insufficient protection for IP rights in China.¹⁷¹

Separate from JBIC's survey, the Japan External Trade Organization (JETRO), which had created a Director of an Industrial Property Department in its JETRO Offices in Bangkok, Thailand, in 1996, renamed the position as Director of the Intellectual Property Department covering ASEAN in 2002.¹⁷² It has also periodically conducted a *Survey on Business Conditions of Japanese Companies in Asia and Oceania* with the stated intent "to understand the current business activities of Japanese-affiliated companies operating in Asia and

166. *Overseas Business Risk*, GOV.UK (Feb. 7, 2017), <https://www.gov.uk/government/collections/overseas-business-risk>. Additional information is available at: <https://www.gov.uk/government/collections/overseas-business-risk>.

167. JBIC, *Reports*, <https://www.jbic.go.jp/en/information/reference> (last visited Mar. 31, 2017).

168. JAP. BANK OF INT'L COOPERATION, *SURVEY REPORT ON OVERSEAS BUSINESS OPERATIONS BY JAPANESE MANUFACTURING COMPANIES* (28th ed. 2016).

169. *Id.*

170. *Id.* at 27.

171. *Id.*

172. The main activities of the JETRO Intellectual Property Department in Bangkok, Thailand, are: 1) Providing legal advisory services on IPR in ASEAN countries to Japanese companies, as well as legal advisory services on IPR in Japan to ASEAN companies; 2) Conducting research and disseminating IPR enforcement information in ASEAN countries, to research and evaluate legislation and its practice on IPR enforcement, i.e. anti-counterfeiting, in each ASEAN country, and to publicize those in "Manual of Countermeasures Against Infringements"; and 3) Hosting IPR Seminars. See *Intellectual Property*, JETRO THAILAND, https://www.jetro.go.jp/thailand/e_activity/property.html (last visited Apr. 2, 2017).

Oceania and to disseminate those findings widely.”¹⁷³ The survey has covered a total of twenty countries/regions, including all ASEAN countries except Brunei. As with the JBIC’s survey, the companies may answer the questionnaire by raising the issues of IP protection and enforcement as one of their concerns in conducting a business in a country.¹⁷⁴ In the 2015 survey, Myanmar was one of the ASEAN countries in which Japanese companies expected to see improvements in the protection of IP rights.¹⁷⁵

G. Trade Agreements

ASEAN has entered into a number of free trade agreements with other Asian nations that are now radically altering the global sourcing and manufacturing landscape. For example, through its FTA with China, ASEAN has effectively eliminated, or at least “reduced tariffs on nearly 8,000 product categories, or 90 percent of imported goods, to zero.”¹⁷⁶ Meanwhile, few of its trade agreements fully and comprehensively address IPR standards or procedures. A notable exception is the ASEAN-Australia-New Zealand Free Trade Agreement (AANZFTA), which covers all sectors, including goods, services, investment, and IPR, making it the most comprehensive trade agreement that ASEAN has ever negotiated.¹⁷⁷ For example, in the Chapter on Intellectual Property, AANZFTA affirms and builds on the rights and obligations of the Parties under TRIPs and provides that nationals of other Parties shall be accorded national treatment.¹⁷⁸ It also contains obligations on copyright, government use of software, trademarks and geographical indications, and transparency.¹⁷⁹

In addition, the cooperation agreed to in Chapter 13, Article 9(5), concerning a Strategy and Resource Kit, was developed as a work plan and supporting tool to encourage IP creators and owners to incorporate

173. JAP. EXTERNAL TRADE ORG., SURVEY ON BUSINESS CONDITIONS OF JAPANESE COMPANIES IN ASIA AND OCEANIA 63 (2015).

174. *Id.*

175. *Id.*

176. China Briefing, *Understanding China’s Free Trade Agreements*, (Feb. 10, 2014) <http://www.china-briefing.com/news/2014/02/10/understanding-chinas-free-trade-agreements.html>.

177. *ASEAN Australia New Zealand FTE (AANZFTA)*, N.Z. FOREIGN AFFAIRS & TRADE,, <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/aanzfta-asean-australia-new-zealand-fta/> (last visited Apr. 23, 2017).

178. Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area, ch. 13, Austl.-Cambodia-Indon.-Malay.-N.Z.-Phil.-Sing.-Thai.-Viet., Feb. 27, 2009.

179. *Id.*

IP into their business plans and management practices.¹⁸⁰ “This Strategy aims to provide a framework for AMS PE&A plans, priorities, and outcomes” of IP education and awareness so that “IP educators can effectively plan and implement activities that target regional businesses and creators in the lead up to ASEAN economic integration.”¹⁸¹ In addition, trade framework agreements with India, Japan, and South Korea have been endorsed and some of the agreements, including those on intellectual property, under such frameworks have been signed and have come into force.¹⁸²

While other trade agreements, such as the FTAs with Japan, contain language about IPR, there are few substantive obligations to change anything in one’s IP regime. Instead, most emphasis is placed on mutual cooperation on education or information exchange. Other FTA agreements, such as those with China, India and South Korea, include merely a broad commitment to cooperate in the IP field. For example, in the ASEAN-India Framework, it mentions that the negotiations between the parties shall also include, but not be limited to the facilitation and promotion of effective and adequate protection of trade-related aspects of IPR based on existing WTO, WIPO, and other relevant agreements.¹⁸³ Similarly, the Memorandum of Understanding between ASEAN and China on Cooperation in the Field of Intellectual Property, adopted in December 2009, only mentions that the cooperation will be in science and technology; economic, trade and culture; a development of a database; assistance with automation; and cooperation on sharing the best practices relating to examinations, quality control and training of examiners.¹⁸⁴

The Framework Agreement on Comprehensive Economic Cooperation of ASEAN-Korea Free Trade Area, states that their cooperation shall include cooperation on IPR education and awareness

180. ASS’N OF SE. ASIAN NATIONS, REGIONAL IP PUBLIC EDUCATION AND AWARENESS STRATEGY, 6 (ASEAN, 2015).), http://aanzfta.asean.org/uploads/docs/PE&A_Strat_STAKEHOLDER.pdf.

181. Albert, *supra* note 11.

182. Chris Devonshire-Ellis, *Understanding ASEAN’s Free Trade Agreements*, ASEAN BRIEFING (Feb. 13, 2014), <http://www.aseanbriefing.com/news/2014/02/13/understanding-aseans-free-trade-agreements.html>.

183. Article 3, 8(h) of *Framework Agreement on Comprehensive Economic Cooperation Between the Republic of India and the Association of Southeast Asian Nations*, Ass’n of Southeast Asian Nations, art. III, ¶ 8(h) (Oct. 8, 2003), http://asean.org/?static_post=framework-agreement-on-comprehensive-economic-cooperation-between-the-republic-of-india-and-the-association-of-southeast-asian-nations-2 [hereinafter Framework Agreement].

184. See *ASEAN–China Free Trade Area*, ASEAN-CHINA FREE TRADE BUS.PORTAL (May 30, 2016), <http://www.asean-cn.org/index.php?m=content&c=index&a=show&catid=267&id=84>.

promotion; conducting international search and preliminary examination under the Patent Cooperation Treaty; and providing assistance in facilitating the enhancement and modernization of IP databases.¹⁸⁵

H. APEC Guidelines on Intellectual Property Issues

Seven of the ten ASEAN Member States¹⁸⁶ are member economies of the Asia Pacific Economic Cooperation (APEC)¹⁸⁷ and its Intellectual Property Experts Group (IPEG).¹⁸⁸ Under IPEG, there are three official observers including the Association of Southeast Asian Nations Secretariat.¹⁸⁹ Representatives of observer organizations can “participate in APEC meetings and have full access to documents and information relating to APEC’s work of member economies.”¹⁹⁰ They can also help track progress and provide guidance in support of APEC objectives.¹⁹¹ APEC has long recognized that “IPR protection and enforcement is a key factor for promoting foreign trade and investment, as well as for boosting economic development.”¹⁹² “In recognition of its importance, IPR was included in the 1995 Osaka Action Agenda— APEC’s strategic roadmap for achieving free and open trade and investment in the region.”¹⁹³

In 1996, the Committee on Trade and Investment (CTI) established an Intellectual Property Rights Get-Together (IPR-GT), the aim was to ensure adequate and effective protection through legislative, administrative and enforcement mechanisms of intellectual property in the Asia-Pacific region based on the principles of the WTO TRIPs Agreement and other related agreements.¹⁹⁴

In 1996, the CTI made the IPR-GT an official APEC group with explicit terms of reference, and renamed it the Intellectual Property Rights Experts’ Group (IPEG).¹⁹⁵

185. See *Economic Cooperation*, ASEAN-KOREA (2012), <http://akfta.asean.org/index.php?page=economic-cooperation>.

186. *ASEAN Member States*, ASS’N OF SOUTHEAST NATIONS (Oct. 18, 2015), <http://asean.org/asean/asean-member-states/> (last visited Mar. 23, 2017).

187. *Member Economies*, ASIA PACIFIC ECONOMIC COOPERATION (2017), <http://www.apec.org/About-Us/About-APEC/Member-Economies.aspx>.

188. *Intellectual Property Rights Experts Group*, ASIA-PAC. ECON. COOPERATION, <http://www.apec.org/Groups/Committee-on-Trade-and-Investment/Intellectual-Property-Rights-Experts-Group.aspx> (last visited Mar. 19, 2017).

189. *Id.*

190. *APEC Observers*, ASIA-PAC. ECON. COOPERATION, (2017), <http://www.apec.org/About-Us/How-APEC-Operates/APEC-Observers>.

191. *Id.*

192. *Intellectual Property Rights Experts Group*, *supra* note 189.

193. *Id.*

194. *Id.*

195. *Id.*

- The IPEG implements a work program which aims to:
- Deepen the dialogue on intellectual property policy;
- Survey and exchange information on the current status of IPR protection and administrative systems;
- Study measures for the effective enforcement of IPR;
- Fully implement the TRIPS Agreement; and
- Facilitate technical cooperation to help economies implement TRIPS.¹⁹⁶

Over the years, various “guidelines”, “effective practices”, and “ministerial statements” have been developed and adopted concerning IPR issues and practices. While the adoption and implementation of such tools is not mandatory on APEC economies, they focus attention on agreed upon principles or practices in the field of IP protection and enforcement. As such, they represent official, APEC statements that can be used to draw attention to a consensus among APEC economies. This, in turn, can be used in official discussions and negotiations on IP matters as persuasive evidence of goals that should be taken into account by member economies and governments in the development of specific IP policies, legislation, or field practices.

I. Assessments by the Private Sector and IP Stakeholders

Many private sector IP stakeholders conduct their own assessments on the IP environment and challenges that they face in a particular region or country. Some, either individually or through larger trade associations, submit their findings or views to the Office of the United States Trade Representative (USTR) as part of the Special 301 annual review process.¹⁹⁷ However, many such assessments are stand-alone studies or reports, two of which warrant mentioning due to their global impact and methodologies employed.

1. Business Software Alliance

The Business Software Alliance (BSA) is the oldest and “leading advocate for the global software industry before governments and in the international marketplace.”¹⁹⁸ “Its members are among the world’s most innovative companies,” such as Microsoft, Apple, Adobe, Autodesk, and

196. *Id.*

197. 2016 Special 301 Report, *supra* note 127.

198. *About BSA*, BSA: THE SOFTWARE ALLIANCE, http://www.bsa.org/about-bsa/?sc_lang=en-US.

more than a thousand others, including some based in ASEAN.¹⁹⁹ Over the years, BSA has published reports on the issues confronting its industry members, including the use of unlicensed software. In 2016, for example, BSA found that despite some gradual improvements over the years, a number of ASEAN countries still have an unacceptably high percentage use of unlicensed business software.²⁰⁰ For example, while Singapore reported a relatively low rate of unlicensed use (30%), Indonesia maintains a staggeringly high rate (84%).²⁰¹ Indonesia's unlicensed use is higher than the global average and most ASEAN countries, which range within 60-70% unlicensed use.²⁰² Accordingly, BSA's top priority in the region is to encourage governments to act as role models for the private and non-profit sector by announcing a firm commitment to institute and maintain policies and procurement practices to acquire and use only licensed software products by their agencies.²⁰³

In general, BSA has had a significant impact on ASEAN member states. It is very vocal in applying its findings to its dealings with local and national governments as a means to not only combat business software piracy and support the legitimate software sector, but also to address increasing challenges and concerns over online consumer protection, cybercrime, and network security.²⁰⁴

2. Global Intellectual Property Center

The Global Intellectual Property Center of the U.S. Chamber of Commerce publishes an annual Global IP Index that utilizes six indices of IP protection in assessing and ranking a country's IP regime and environment.²⁰⁵ The six indices are copyrights, patents, trademarks, trade secrets and market access, enforcement, and ratification of international treaties.²⁰⁶ In the 2017, the Global IP Index evaluated forty-five countries

199. *BSA Global & Global Policy Members*, BSA: THE SOFTWARE ALLIANCE, http://www.bsa.org/about-bsa/?sc_lang=en-US.

200. *See Seizing Opportunity Through License Compliance: BSA Global Software Survey*, BSA: THE SOFTWARE ALLIANCE (May 2016), http://globalstudy.bsa.org/2016/downloads/studies/BSA_GSS_US.pdf#page=5. *See* http://globalstudy.bsa.org/2016/downloads/studies/BSA_GSS_US.pdf#page=5http://globalstudy.bsa.org/2016/downloads/studies/BSA_GSS_US.pdf#page=5.

201. *Id.* at 6.

202. *Id.*

203. *Id.* at 5.

204. *Id.* at 4.

205. U.S. Chamber Int'l IP Index, *The Roots of Innovation*, GLOBAL INTELL. PROP. CTR. U.S. CHAM. OF COM. (Feb. 2017), http://www.theglobalipcenter.com/wp-content/uploads/2017/02/GIPC_IP_Index_2017_Report.pdf.

206. *Id.*

worldwide, of which seven were ASEAN members.²⁰⁷ While, in general, most of the ASEAN countries listed received positive comments for providing basic IP protection, many were criticized for failing to adopt effective, sustained IPR enforcement against ongoing problems, especially online infringement.²⁰⁸

VII. LOOKING FORWARD

A. *Trans-Pacific Partnership (TPP)*

Since its announcement in 2010, the Trans-Pacific Partnership Agreement (TPP) has received considerable media attention.²⁰⁹ In brief, TPP is a multinational trade agreement built on the Trans-Pacific Strategic Economic Partnership Agreement, also known as the P4, between Brunei Darussalam, Chile, New Zealand, and Singapore, effective since 2006.²¹⁰ In March 2010, the P4 members launched a new round of negotiations to expand the agreement and invite Australia, Peru, Singapore, Vietnam, and the United States.²¹¹ Later, Malaysia was invited to join the negotiating members of the now expanded TPP.²¹² Canada and Mexico joined in late 2012 and Japan joined in mid-2013.²¹³ In October 2015, the parties concluded negotiations and signed the agreement in February 2016.²¹⁴ However, the TPP will only enter into force pursuant to its own terms, i.e., upon completion of the individual ratification or approval processes of each of the twelve signatory states involved.²¹⁵

207. *Id.*

208. *Id.*

209. See, e.g., Kevin Granville, “What Is TPP? Behind The Trade Deal That Died.” *New York, N.Y. Times* (January 23 January January January January Jan. January 23, 2017), www.nytimes.com/interactive/2016/business/tpp-explained-what-is-trans-pacific-partnership.html?_r=0.

210. *Trans Pacific Partnership Agreement (TPP) - Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam*, Foreign Trade Information System, http://www.sice.oas.org/TPD/TPP/TPP_e.ASP (last visited April 22, 2017).

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. Under Chapter 30 of the TPP, there are three options for it to come into force: First, prompt agreement by all such that if all twelve countries ratify the TPP within two years of its signing, the TPP will enter into force sixty days after the final country’s ratification; second, sufficient ratification by February 4, 2018 such that if all twelve countries have not ratified the TPP within two years of the TPP’s signing, it will enter into force sixty days later if at least six of the original signatories account for at least 85% of the combined GDP of the original signatories that ratified; and third, future ratification such that if the TPP does not come into force under options 1 or 2, it will come into force 60 days after at least six of the original signatories that account for at least 85% of the combined GDP of the original signatories ratify it. For the above purposes, a

The TPP contains a comprehensive and detailed chapter on the standards and practices involved in all aspects of IP protection and enforcement,²¹⁶ and has been characterized as a “high standard” or the “gold standard” of IP protection.²¹⁷ While many in the United States assumed that the adoption of TPP and its subsequent implementation would have a positive ripple effect on raising IP standards throughout the Asia-Pacific region, and perhaps most notably in ASEAN where four Member States were TPP member countries,²¹⁸ others have expressed concerns about the potential negative impact on the six ASEAN countries that are not TPP countries. These critics emphasize a possible threat to the internal economic integration of ASEAN, with a further widening of the already existing disparity in IPR regulation and enforcement among Member States.²¹⁹

The twelve TPP countries represent a population in excess of 810 million people (11.5% of the global population) and a combined GDP of approximately US \$28.0 trillion (36% percent of total global economic activity).²²⁰ The key players are the United States and Japan, which represent 62% and 17% of the combined GDP of the TPP countries, respectively.²²¹ Due to the existing requirement that ratifying countries must compose at least 85% of the combined GDP, since the U.S. alone accounts for over 60% percent of the combined TPP GDP, it is not

country is said to have ratified the TPP when it provides written notice of the completion of its applicable legal procedures, which differs for each country.

216. See also *Trans-Pacific Partnership Intellectual Property Provisions*, OFF. OF THE U.S. TRADE REP., <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2015/october/summary-trans-pacific-partnership> (last visited Apr. 22, 2017).

217. See, e.g., Sean M. Flynn, Brook Baker, Margot Kaminski &, and Jimmy Koo, *The U.S. Proposal for an Intellectual Property Chapter in the Trans-Pacific Partnership Agreement*, 28 AM. U. INT'L L. REV. 105, 113 (2016); also Ethan Blumenthal, *Report: The Trans-Pacific Partnership and Intellectual Property: Lessons for the Next Free Trade Deal*, N.C. J. INT'L L., <http://ncilj.org/report-the-trans-pacific-partnership-and-intellectual-property-lessons-for-the-next-free-trade-deal>; *North Carolina Journal of International Law*, <http://ncilj.org/report-the-trans-pacific-partnership-and-intellectual-property-lessons-for-the-next-free-trade-deal>; Carlos A. Primo Braga, *TPP: The New Gold Standard for Intellectual Property Protection in Trade Agreements*, HUFF. POST (Mar. 24, 2016), http://www.huffingtonpost.com/eastwest-center/tpp-the-new-gold-standard_b_9544428.html.

218. See, e.g., Joshua P. Meltzer, *The Trans-Pacific Partnership is a Win for All Parties*, BROOKINGS INST. (Dec. 9, 2015), <https://www.brookings.edu/blog/future-development/2015/12/09/the-trans-pacific-partnership-is-a-win-for-all-parties>.

219. Jingyang Chen, *TPP and RCEP: Boon or Bane for ASEAN?*, ASIA FOUND. (Sept. 9, 2015), <http://asiafoundation.org/2015/09/09/tpp-and-rcep-boon-or-bane-for-asean>.

220. *Trans-Pacific Partnership Agreement: Likely Impact on the U.S. Economy and on Specific Industry Sectors*, U.S. INT'L TRADE COMMISSION 52, 52-53 (2016), <https://www.usitc.gov/publications/332/pub4607.pdf>.

221. BROCK WILLIAMS, CONG. RESEARCH SERV., R42344, *TRANS-PACIFIC PARTNERSHIP (TPP) COUNTRIES: COMPARATIVE TRADE AND ECONOMIC ANALYSIS 2* (2013).

possible, as it currently exists, for TPP to enter into force without United States' participation.²²²

However, the United States has now formally withdrawn from the TPP,²²³ creating both legal and political uncertainty as to whether the TPP can survive or ever enter into force.²²⁴ While some TPP countries, such as Canada, have expressed varying reactions, ranging from hopefulness that TPP can survive,²²⁵ to TPP being "dead" without the involvement of the United States,²²⁶ others, including Malaysia, Mexico, and Singapore, have expressed a different opinion of TPP's continuing viability.²²⁷ Some have announced their intention to proceed with TPP implementation in their domestic legislation and regulations, regardless of whether TPP ultimately survives or comes into force,²²⁸ while others have indicated less interest in doing so.²²⁹

Others, most notably Australia and New Zealand, have also indicated an intention to proceed with the agreement despite the U.S.'s

222. *Id.* at 2.

223. The United States formally withdrew from the TPP on January 23, 2017, when President Donald J. Trump signed an Executive Order withdrawing the United States from the agreement. *See, e.g.,* Ylan Q. Mui, *President Trump Signs Order to Withdraw from Trans-Pacific Partnership*, WASH. POST (Jan. 23, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/01/23/president-trump-signs-order-to-withdraw-from-transpacific-partnership/?utm_term=.5b58caa666e0.

224. The TPP Agreement permits a country to withdraw by providing six months' prior notice. The six-member 85% requirement laid out in the Agreement does not appear to be reapplied following a withdrawal of a member, leading to the situation that a smaller TPP group is possible to proceed with the Agreement following a withdrawal of an original member country. Ooi Tee Ching, *TPP Can Still Proceed Without US, Amend Requirement Clause: Miti Minister*, NEW STRAITS TIMES (Nov. 22, 2016), <http://www.nst.com.my/news/2016/11/190926/tpp-can-still-proceed-without-us-amend-requirement-clause-miti-minister>.

225. *See, e.g.,* Josh Wingrove, *Canada Hopeful TPP Can Survive Without U.S., Trade Minister Says*, BLOOMBERG NEWS (Jan. 21, 2017), <https://www.bloomberg.com/news/articles/2017-01-20/canada-hopeful-tpp-can-survive-without-u-s-trade-minister-says>.

226. *See, e.g.,* David Ljunggren, *Canada Says TPP Trade Deal Dead Without United States*, REUTERS BUS. NEWS (Jan. 24, 2017), <http://www.reuters.com/article/us-usa-trump-trade-canada-idUSKBN1582P3>.

227. *See, e.g.,* Ching, *supra* note 225.

228. Such countries include Brunei, Japan, Malaysia, Singapore, and Vietnam, which are all in various stages of legislative or other efforts aimed at implementing the various obligations and commitments they made under the TPP Agreement. Hunter Marston, *What the Trans-Pacific Partnership Means for Southeast Asia*, THE DIPLOMAT (Jul. 27, 2015), www.thediplomat.com/2015/07/what-the-trans-pacific-partnership-means-for-southeast-asia.

229. Chile and Canada seem to fall into this category, with Mexico indicating that it is waiting to make a decision pending future possible renegotiation of the North American Free Trade Agreement (NAFTA). Janyce McGregor, *Canada confirms participation in post-TPP talks next month in Chile*, CBC NEWS (Feb. 9, 2017), www.cbc.ca/news/politics/tpp-chile-champagne-1.3974182.

withdrawal, or to attempt to salvage the TPP in some fashion.²³⁰ For instance, Australia has floated the idea of opening the TPP up to China and Indonesia, and discussing how to proceed with the concept of a “TPP 12 minus one” at recent APEC and World Economic Forum meetings.²³¹ However, some countries, most notably Japan, have demonstrated an initial resistance to doing so “by saying a TPP deal without the U.S. is meaningless.”²³²

While some countries, including ASEAN Member States like Indonesia, Thailand, and the Philippines (under its previous government), have indicated an interest in joining TPP, the mere desire to join is not the same as meeting the standards and obligations laid out in the agreement, including what is often characterized as the sensitive topic of IP.²³³

Given the current uncertainty over TPP, its long-term impact on ASEAN nations is more unclear. For example, Japan has used the TPP as “‘a standard reference’ in its negotiations on other free trade pacts, such as the Regional Comprehensive Economic Partnership.”²³⁴ In the short term, it appears there is general agreement, if not an actual stated consensus, that the high standards agreed to under TPP are worthwhile and that they have value independent of whether the United States is a member of the TPP or not, and that TPP will move forward even in the absence of the United States as a member.²³⁵

230. See, e.g., Greg Dyett, *Australia Not Giving Up on Trans-Pacific Partnership*, SBS WORLD NEWS RADIO (Jan. 24, 2017), www.sbs.com.au/news/article/2017/01/24/australia-not-giving-trans-pacific-partnership (Prime Minister Malcom Turnbull indicates that Australia has had discussions with Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, and Singapore about salvaging the TPP without US involvement).

231. See, e.g., Paul Karp, *Australia Opens to China and Indonesia Joining TPP After US Pulls Out*, THE GUARDIAN (Jan. 23, 2017), www.theguardian.com/australia-news/2017/jan/24/australia-open-to-china-and-indonesia-joining-tpp-after-us-pulls-out.

232. Reiji Yoshida, *Tokyo Turns Down Australian Proposal for TPP Without U.S.*, JAP. TIMES (Jan. 24, 2017), www.japantimes.co.jp/news/2017/01/24/national/politics-diplomacy/tokyo-turns-australian-proposal-tpp-without-u-s-vows-keep-pushing-trump/#WKQHoVV97cs.

233. For a concise explanation of the options available for how TPP can come into force and the mechanics for future expansion, see Darren Murphy & Laura Fraedrich, *TPP Ratification and Potential Expansion*, JONES DAY: TRANS-PACIFIC PARTNERSHIP BLOG (Jun. 20, 2016), www.lexology.com/library/detail.aspx?g=4a075fb0-638c-4a38-a6c5-b6faba04007d.

234. See Yoshida, *supra* note 233.

235. See, e.g., Motoko Rich, *TPP, the Trade Deal Trump Killed, Is Back in Talks Without U.S.* N.Y. Times (July 14, 2017), <https://www.nytimes.com/2017/07/14/business/trans-pacific-partnership-trade-japan-china-globalization.html>; Alex Capri, *The TPP Moves Forward Without Trump's America*, Forbes (May 22, 2017), <https://www.forbes.com/sites/alexcapri/2017/05/22/the-tpp-moves-forward-without-trumps-america/#52fff5b74fed>.

B. Regional Comprehensive Economic Partnership Agreement (RCEP)

Characterized by some as a rival to TPP, RCEP is composed of the ASEAN Member States and the six states with which ASEAN has existing free trade agreements – Australia, China, India, Japan, New Zealand, and South Korea.²³⁶ Should it be concluded and enter into force, the RCEP would create one of the world's largest free-trade zones, encompassing almost half of the global population (46%) and 24% of global GDP.²³⁷

The RCEP negotiation was launched in November 2012, with the objective of achieving a modern, comprehensive, high-quality, and mutually beneficial economic partnership agreement among ASEAN member countries and ASEAN's FTA partners.²³⁸ As conceived, it would cover trade in goods and services, investment, economic and technical cooperation, competition, IP, dispute settlement and other issues.²³⁹

As the RCEP is an ongoing trade negotiation and nothing has been finalized, the level of IP protection it will require is still unclear. However, section V of the Guideline and Objective for Negotiating the Regional Comprehensive Economic Partnership states that, "The text on intellectual property in the RCEP will aim to reduce IP-related barriers to trade and investment by promoting economic integration and cooperation in the utilization, protection and enforcement of intellectual property rights."²⁴⁰ We can safely assume, therefore, that intellectual property will be part of the agreement negotiation, and those countries with higher standards of IP protection, such as Japan or South Korea, may push for a similar level of protection to what they currently provide themselves and, in some cases, to others under existing FTAs.²⁴¹

Currently, no official text of the IP chapter in RCEP has been released, although a draft text dated October 15, 2015, was leaked

236. See Emiko Jozuka, *TPP vs. RCEP? Trade Details Explained*, CNN (Jan. 26, 2017), <http://www.cnn.com/2017/01/24/asia/tpp-rcep-nafta-explained>.

237. *Id.*

238. *Regional Comprehensive Economic Partnership*, AUSTL. GOV'T DEP'T OF FOREIGN AFF. AND TRADE, <http://dfat.gov.au/trade/agreements/rcep/pages/regional-comprehensive-economic-partnership.aspx> (last visited Apr. 9, 2017).

239. See Austl. Dep't Foreign Aff. & Trade, *Guiding Principles and Objectives for Negotiating the Regional Comprehensive Economic Partnership* (Nov. 20, 2012), <http://dfat.gov.au/trade/agreements/rcep/Documents/guiding-principles-rcep.pdf>.

240. *Id.*

241. See, e.g., Korea-United States Free Trade Agreement, S. Kor.-U.S., ch. 18, Mar. 15, 2012, [U.S.T. citation], www.ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file273_12717.pdf.

online.²⁴² Based on the unofficial draft, it is apparent that the IP issues discussed and negotiated in TPP are also being discussed in RCEP.

By way of example, the Copyright section of RCEP requires signatory states to accede to international treaties such as the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.²⁴³ Additionally, RCEP would require parties to accede to the Beijing Treaty on Audiovisual Performance, the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, and the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled.²⁴⁴ Unlike TPP, RCEP would not increase the term of protection for copyright beyond the minimum requirement of 50 years from life of the author, as required under the Berne Convention.²⁴⁵

In the Trademark section, the RCEP draft is similar to TPP, except for its significantly shorter emphasis on domain names and the method by which geographical indications are protected.²⁴⁶ In the Patent and Trade Secret section, similar issues negotiated in TPP, such as patent term extension and data exclusivity, are discussed for inclusion; however, there is no apparent mention of protection for biologics.²⁴⁷

In sum, it appears that the language on IP, while fairly characterized as a similar, is actually a lighter version of TPP, with perhaps a stronger emphasis on the issues of protection of genetic resources, traditional knowledge, cultural expressions, and folklore.²⁴⁸

In the absence of TPP, RCEP may become the most important trade agreement to ASEAN Member States, and the IP chapter, should they become actual obligations as opposed to aspirational goals, might be easier for lesser developed ASEAN Member States to accept and implement. However, if both TPP and RCEP fail, it is possible that the proposal put forward at the APEC Meetings in 2014, which were hosted by China, to create a Free Trade Area of the Asia-Pacific (FTAAP), may become a viable vehicle for trade harmonization in the APEC region, and

242. See 2015 Oct 15 Version: RCEP IP Chapter, KNOWLEDGE ECOLOGY INT'L, <http://keionline.org/node/2472> (last visited Mar. 18, 2017); see <http://keionline.org/node/2472>.

243. *Id.*

244. *Id.*

245. *Id.*

246. Peter K. Yu, *The RCEP and Trans-Pacific International Intellectual Property Norms*, in TEX. A&M LEGAL STUD. 16 (2016); Research PAPER NO.: *Intellectual Property and Asian Values*, MARQ. INTELL. PROP. L. REV. 329 (2012).

247. *Id.*

248. See generally *Id.*

“free smaller economies from having to choose between joining either China or the U.S.”²⁴⁹

C. The Influence of Future Technical Assistance and Capacity-Building on IPR

1. Australia

Australia has many ongoing assistance and capacity-building programs that are provided to ASEAN countries, with one of its most “significant engagement in the region is a comprehensive online patent examination training program for overseas IP offices, known as the Regional Patent Examination Training (RPET) program.”²⁵⁰ “RPET is funded under the ASEAN-Australia-New Zealand Free Trade Agreement (AANZFTA) Economic Cooperation Work program and with support from the World Intellectual Property Organization (WIPO).”²⁵¹ In addition, Australia partners with WIPO to deliver development cooperation in other areas, including a recent focus on traditional knowledge under the Australia-WIPO Funds in Trust (FIT) program.²⁵²

2. European Community

Over the past two decades, the European Community has provided several technical assistance programs to ASEAN through its European Commission-ASEAN Intellectual Property Rights Cooperation Program (ECAP). Its first iteration, ECAP I, started in September 1993 and focused on patents and trademarks, and assisting ASEAN countries in promoting their systems for the protection of industrial property rights.²⁵³ The ECAP II Project “launched in 2000 and focused on furthering harmonisation and long term capacity-building issues.”²⁵⁴ The EU and ASEAN approved the ECAP III Project through a signed Financing Agreement in 2009, and from 2010 to 2011, the European Patent Office (EPO) implemented Phase I.²⁵⁵ “In 2012, the European Union and

249. Zha Daojiong, “APEC Miracle: How the US and China Can Look Beyond TPP and RCEP for Asia Pacific Trade Harmony,” South China Morning Post (August 6, 2017), <http://www.scmp.com/comment/insight-opinion/article/2105460/apec-miracle-how-us-and-china-can-look-beyond-tpp-and-rcep>.

250. See *Global Engagement*, IP AUSTL., [https://www.ipaustralia.gov.au/about-us/global-engagement#Asia-Pacific cooperation](https://www.ipaustralia.gov.au/about-us/global-engagement#Asia-Pacific%20cooperation) (last visited Mar. 18, 2017).

251. *Id.*

252. See *Id.*

253. *About ECAP – ECAP Project Overview (1993-2016)*, ECAP III, <http://www.ecap-project.org/about/ecap-project-overview-1993-2016> (last visited Mar. 18, 2017).

254. *Id.*

255. *Id.*

ASEAN reformulated the project content so as to have it realigned in accordance with the ASEAN IPR Action Plan 2011-2015.²⁵⁶ Phase II is managed by the EU Intellectual Property Office (formerly the Office for Harmonization in the Internal Market), and has the following strategic goals:

- Strengthen the institutional capacity for IP administration and enforcement in the ASEAN region;
- Develop the legal and policy frameworks enabling the ASEAN countries to effectively participate in global protection systems for IP;
- Promote the use of IP by the productive sector in the ASEAN countries as a tool for development; and
- Enhance IP institution building and integration in the ASEAN region through intensified collaboration among the ASEAN Members States and with the ASEAN Secretariat.²⁵⁷

The ECAP III Project supports ASEAN regional integration and “the further upgrade and harmonize the systems for IP creation, protection, administration, and enforcement in the ASEAN region.”²⁵⁸ Apart from holding a number of workshops and capacity-building programs in industrial property,²⁵⁹ the Project has integrated ASEAN member states into the ASEAN TMview, TMclass and DesignView databases.²⁶⁰ An ASEAN-specific portal for each of the databases has been set up, providing trademark and design data available in Indonesian, Khmer, Lao, Myanmar, Thai and Vietnamese.²⁶¹ This provides easy to access trademark and design data direct to users of the trademark and design system in the ASEAN member states. In addition, some IP offices in ASEAN member states have incorporated their data into TMview, TMClass and DesignView.²⁶² Apart from the overall thrust and impact of the ECAP Project, other European agencies, like the European Patent Office, regularly provide technical assistance to ASEAN members.²⁶³

256. *Id.*

257. *About ECAP – ECAP III Phase II*, ECAP III, <http://www.ecap-project.org/about/ecap-iii-phase-ii> (last visited Mar. 18, 2017).

258. *Id.*

259. *See Events*, ECAP III, <http://www.ecap-project.org/events> (last visited Apr. 2, 2017). *See* <http://www.ecap-project.org/events>.

260. *Id.*

261. *Id.*

262. *See International Cooperation*, EUR. UNION INTELL. PROP. OFFICE, <https://euipo.europa.eu/ohimportal/en/international-cooperation> (last visited Apr. 2, 2017).

263. *See ASEAN and Europe Strengthen Cooperation on Patents*, ASS'N OF SOUTHEAST ASIAN NATIONS (Feb. 27, 2014), www.asean.org/asean-and-europe-strengthen-cooperation-on-patents.

3. Japan

With many Japanese companies investing and developing their businesses in Southeast Asia,²⁶⁴ Japan has a strong and compelling commercial interest in assisting in the improvement of the level of IP protection and enforcement in ASEAN. To this end, the Japan Patent Office (JPO) has regularly held formal sessions of the Japan-ASEAN Heads of Intellectual Property Offices Meetings since its inauguration in 2012, and has emphasized its commitment to supporting the building of stronger IP environments in ASEAN countries.²⁶⁵

The JPO has supported and funded scholarships for IP and judicial officials; the drafting or updating of patent and trademark examination manuals and examination guidelines; studies on the workload projections of national IP offices; and recommendations on policy adoptions by IP offices in the ASEAN region, with the assistance and technical support of the Economic Research Institute for ASEAN and East Asia (ERIA), a Japanese governmental agency.²⁶⁶

Moreover, Japan's and ASEAN member states' national IP offices have agreed to work together in supporting the accession of ASEAN countries to various international IP application systems, like the Madrid Protocol and UPOV, and supporting implementation efforts by national offices, including human resource development and management of examination practices in ASEAN countries.²⁶⁷

4. South Korea

South Korea provides technical IP assistance to ASEAN countries through two key government agencies, the Korean Intellectual Property Office (KIPO) International Intellectual Property Training Institute (IIPTI) and the Korea Copyright Commission (KCC).²⁶⁸ The KIPO IIPTI is responsible for IP education in Korea, and, in collaboration with WIPO and the Korea International Cooperation Agency (KOICA), KIPO conducts educational training programs for IP-related officials in the public and private sectors of developing and lesser developed countries

264. *Id.*

265. *See Japan-ASEAN IP Cooperation Programs Enhanced*, MINISTRY OF ECON., TRADE & INDUSTRY (July 20, 2016), http://www.meti.go.jp/english/press/2016/0720_01.html.

266. *Id.*

267. *See Japan-ASEAN IP Cooperation Programs Enhanced*, MINISTRY OF ECON., TRADE & INDUSTRY (Jul. 20, 2016), http://www.meti.go.jp/english/press/2016/0720_01.html.

268. *See generally Korea to Provide Education on Intellectual Property to ASEAN Members*, KOREA.NET (Dec. 15, 2009), <http://www.korea.net/NewsFocus/policies/view?articleId=75542>.

to enhance IP awareness and develop IP systems in those countries, especially in ASEAN.²⁶⁹

For example, in 2016 alone, KIPO organized fifteen international training programs for examiners and officials from Southeast Asia.²⁷⁰ In addition, under a Joint Cooperation Agreement between WIPO and APEC for the development of e-learning content, KIPO has developed English IP e-learning content and administered relevant educational courses that trainees can easily access and utilize through the Internet.²⁷¹

KCC primarily provides ASEAN technical IP assistance in copyright field through its branch offices in Bangkok, Hanoi, and Manila. KCC's primary mission is to provide assistance and cooperation in raising public awareness and developing outreach campaigns to government and copyright-related organizations in each country in the region.²⁷² In 2012, for example, the Copyright Office of Vietnam and KCC signed a Memorandum of Understanding on cooperating in copyright and relevant rights, with a goal of increasing the exchange of information and documents relating to law and technology in the copyright field; boosting human resources development; and creating favorable conditions for studying and sharing experiences. In 2013, KCC and the Thai Department of Intellectual Property signed a similar agreement to cooperate on enforcement activities and awareness on copyright infringement, neighboring rights and IPR, human resource exchanges, and cooperation in the international community.²⁷³ The KCC has also conducted study visit programs that provide relevant officials opportunities to learn about the copyright protection system in Korea, and regularly hold annual forums on copyright-related issues and topics with Indonesia, Malaysia, Philippines, Thailand, and Vietnam, where experts from both government agencies and the private sector share their experience and information.²⁷⁴

269. *Id.*

270. See *International Courses*, KOREAN INTELL. PROP. OFF., www.kipo.go.kr/kpo/user.tdf?a=user.english.html.HtmlApp&c=91009&catmenu=ek02_03_02 (last visited Apr. 2, 2017).

271. See *Bilateral & Multilateral Cooperation*, KOREAN INTELL. PROP. OFFICE, www.kipo.go.kr/kpo/user.tdf?a=user.english.html.HtmlApp&c=100014&catmenu=ek02_02_01_04 (last updated May 24, 2016).

272. See *Overseas Office - Bangkok Office*, KOREAN COPYRIGHT COMMISSION, <http://www.copyright.or.kr/eng/about-kcc/overseas-offices/bangkok-office.do> (last visited Mar. 14, 2017).

273. See *Korea-Thailand expand cooperation on copyright law*, KOREA.NET, <http://www.korea.net/NewsFocus/policies/view?articleId=114819> (last visited Apr. 23, 2017).

274. See *News*, KOREAN COPYRIGHT COMMISSION, <http://www.copyright.or.kr/eng/activities/news/list.do> (last visited Mar. 14, 2017).

5. United States

As a major proponent of TRIPS, since its entering into force in 1995, the United States has engaged in a substantial number of bilateral and regional training and educational activities aimed at assisting countries in its implementation, and in strengthening and enhancing IP legal regimes in Southeast Asia. This has been carried out, in part, by agencies such as the USPTO, which have acted to provide technical assistance, training, and capacity-building on IP administration, examination practice, substantive IP law, and the enforcement of IPR against infringement or misappropriation.²⁷⁵

While there are a few earlier examples of technical IP assistance and training, starting in earnest in 1967,²⁷⁶ the USPTO has hosted, funded, sponsored, or organized countless programs, seminars, study visits, conferences and other activities involving governmental officials from Southeast Asian countries.²⁷⁷ Specifically, it has extended substantial technical assistance on the development of modern IP regimes; best practices for the administration and operation of national IP offices, and patent and trademark examination practices; and the technical drafting and revisions to IP legislation.²⁷⁸ USPTO has also funded other organizations, like the International Intellectual Property Institute, to conduct studies, provide assistance, and engage officials, the public, and the private sector in IP discussions with the goal of increasing awareness and public information as to the value of intellectual property and the importance of strengthening its enforcement and protection systems.²⁷⁹

Beginning with the USPTO engagement with ASEAN in 2003, which resulted in the signing of a formal partnership agreement on technical IP assistance and cooperation in capacity-building, known as

275. For a discussion of the history of technical assistance, training programs, and capacity-building activities carried out by the USPTO, see Peter N. Fowler, *Capacity-Building as an Integral Tool in IPR Enforcement Efforts: The USPTO Experience*, 17 FORDHAM INTELL. PROP. L. & POL'Y CONF. 1, 13 -23 (2009) 13-23, www.fordhamipconference.com/wp-content/uploads/2010/08/Peter_Fowler_Capacity-Building_As_An_Integral_Tool_In_IPR_Enforcement_Efforts_the_USPTO_Expe.pdf.

276. *Id.* at 12, n. 44.

277. See generally, Fowler *supra* note 274. The earliest mention of the USPTO and Southeast Asian training programs was in 1969, when a Thai official attended an in-house training for government industrial property officials of developing countries. Between 1980 and 1999, all countries in the region, except Myanmar, had participated in USPTO training and capacity-building programs, or had been provided with technical assistance on IP-related issues. While government officials participated sporadically in various ASEAN-USPTO programs from 2004-2012, upon the lifting of trade sanctions, additional training and technical assistance has been extended on a regular bilateral basis to Myanmar.

278. See generally *id.* at 1-2, 10-13.

279. See generally *id.* at 3-4.

the Letter of Arrangement, in 2004, the USPTO became the first foreign IP office and the first U.S. Government agency to enter into a formal agreement with the ASEAN Secretariat and the ASEAN Working Group on Intellectual Property Cooperation.²⁸⁰ This partnership agreement, which serves as an umbrella framework for bilateral engagement, has been regularly extended by the parties and currently runs through the end of 2021.²⁸¹ Under it, countless examples of partnership and mutually beneficial engagement and experience-sharing on IP issues have taken place, involving thousands of government officials, the university and research sectors, and all types of creators, inventors and stakeholders in the private and nonprofit sectors, as well as the general public.²⁸²

6. WIPO

As the sole international intergovernmental body with a mandate to promote IP protection and enforcement globally, WIPO regularly conducts workshops and seminars throughout the region. Reflecting the growing importance of the ASEAN region, WIPO established a regional office in Singapore in 2005.²⁸³

The WIPO Singapore Office (WSO) seeks to increase innovation and creativity in the ASEAN region by primarily focusing its outreach efforts on the private IP sector, rights holders, and stakeholders, not on national government agencies.²⁸⁴ The WSO seeks to develop “IP capacity in the region; encourage economic growth through increased innovation and creativity; increase strategic use of the PCT [Patent Cooperation Treaty], Madrid Protocol, and Hague Design Treaty systems” as a strategic edge in competition; and “improve understanding of and respect for IP.”²⁸⁵ The WSO has worked closely with international donor agencies in the region in the arrangement of training and capacity building in the region to make sure that WIPO programs are complimenting, not duplicating, activities and efforts by the various governmental donor agencies active in ASEAN.²⁸⁶

280. *Id.* at 21.

281. *See generally* Nick Redfearn & Fabrice Mattei, *The ASEAN IP Question and its Impacts on Your IP Strategies*, ROUSE MAG. (Jun. 24, 2015), www.rouse.com/magazine/news/the-asean-ip-question-and-its-impact-on-your-ip-strategies/?tag=philippines.

282. *See* Fowler, *supra* note 274, at 24.

283. *See About the Singapore Office*, WORLD INTELL. PROP. ORG., www.wipo.int/about-wipo/en/offices/singapore/about_wso/index.html (last visited Mar. 15, 2017).

284. *Id.*

285. *Id.*

286. *Id.*

In 2010, the WIPO Arbitration and Mediation Center Office in Singapore “opened to promote alternative dispute resolution procedures (ADR),” such as commercial arbitration and mediation of IP disputes.²⁸⁷

VIII. ASEAN CONFRONTS ITS FUTURE

When discussing ASEAN’s future, the major question to consider is whether increasing regional competition among ASEAN countries to attract sustainable and higher-value investment will lead to the creation of an innovative and enhanced IP environment in Southeast Asia. An additional question, always lurking in the background, is whether Singapore and other regional leaders in IP protection will serve as models that inspire others, or whether their success will be discounted as somehow unique and irreplacable by other ASEAN economies.

A. Challenges to Harmonization of Intellectual Property Laws and Systems

If, in the absence of a consolidated and unified IP regime, a leading indicator of ASEAN’s ability to integrate its IP regime is the degree to which it is able to harmonize the existing IP laws and procedures in the ten member states, it would seem that this may prove to be an almost insurmountable goal. Given the disparity of economic levels, variations on legal systems, and cultural attitudes about the importance and value of IP to national economic development, it is a very hard row to hoe, if not a veritable minefield, of obstacles and differences lying in wait of well-intentioned and unsuspecting IP advocates.

Since the process began in the 1990s, efforts at such harmonization have been fairly basic and incremental, with few victories to date. Even basic initiatives, like the adoption of a single patent and trademark application form for use by all national offices, take years to achieve, and have yet to be implemented by all ASEAN offices. Comparative analysis and rationalization of various fees associated with IP office practice is a slow and unyielding slog, which has yet to show an impact after years of discussion and urging by the users of the system.

While practice greatly varies amongst countries, the conduct of public consultations and acceptance and consideration of private sector input on policy changes, regulatory revisions, operational practices, examination guidelines, and rules are inconsistent from country to country, with little desire or attempt at the regional level to harmonize

287. *Id.*

them or even, in some cases, to engage in meaningful consultations with the stakeholders who are the customers and users of the IP system.

Foreign IP offices and stakeholders have tried to influence and encourage greater transparency and public consultation in these areas, but often with mixed results. However, as the scope of cooperation and greater levels of experience-sharing occur between ASEAN member states' national IP offices and those of their foreign counterparts, hopefully the culture of public consultation, transparency in administrative decision-making, and rule-setting accepted as the norm in most IP offices will become more standard and open to, rather than defensive of, operational criticisms.

B. Case Studies Reflecting Greater Policy Awareness of the Importance of IP

Below are four case study examples of how ASEAN countries are addressing issues of IP protection and enforcement, and creating influential models for their neighbors.

1. Cambodian National Intellectual Property Strategy

In response to the growing awareness of the importance of a strong legal IP regime and environment to the national economy and trade, the Cambodian Government, with assistance and support from WIPO, developed the Cambodian National Intellectual Property Strategy.²⁸⁸ Its stated objectives are:

- Objective 1: Improve the capability and capacity within the Cambodian economy to provide and use intellectual property services to support Cambodia's economic development.
- Objective 2: Improve the capability and capacity within the Cambodian Government to deliver intellectual property policy and services to support Cambodia's agricultural, commercial, industrial and cultural sectors and the tourism industry.
- Objective 3: Improve awareness and understanding within the broader population of the economic role of intellectual property to support the increasing use of the intellectual property system by Cambodian businesses.

288. See *Framework of the Draft National IP Strategy (Cambodia)*, MINISTRY OF COMM. KINGDOM OF CAMBODIA, See http://www.moc.gov.kh/tradeswap/userfiles/file/uploadedfiles/Job/9.IPStrategy-DetailsObjectives-Initiatives-Final5_21_2013_1_50_54.pdf (last visited Apr. 2, 2017).

- Objective 4: Develop and maintain Cambodia's intellectual property legislation with international standards to meet Cambodia's economic and social needs.²⁸⁹

These four objectives are intended to positively impact six key sectors of the economy: Agriculture, Culture, Education, Health, Industry and Commerce, and Tourism.²⁹⁰ The Cambodian Government's stated goal is to achieve these objectives by 2020.²⁹¹ This is clearly an ambitious and laudable goal, which will require a concerted and sustained commitment of resources and political will. The Cambodian Government faces significant challenges including limited public awareness of the importance and value of IP; the capacity levels and technical skills of the bureaucracy and enforcement agencies; budget constraints faced by IP-focused governmental agencies; and, to a certain extent, a lack of internal government coordination and unification of IP administrative and policy functions in a single government agency, with sufficient authority and resources to significantly change the outcome. Yet, Cambodia deserves to be acknowledged for taking such a strategic government-wide approach to IP issues.

2. Philippines Action Plan on IP Rights Enforcement 2017-2022

With a substantive legal IP regime that is fairly modern, over the past several years, the Philippines has increasingly focused its attention and human resources on improving its IP enforcement. In late 2016, the Intellectual Property Office of the Philippines ("IPOPHL") announced the release of the National Committee on Intellectual Property Rights ("NCIPR") 2017-2022 Action Plan on IP Rights Enforcement during the 6th Philippine Anti-Counterfeiting and Piracy Summit, along with representatives from the various member agencies of the NCIPR.²⁹² The Action Plan consists of seven points:

1. Include mainstream IP policy in the government;
2. Scale up the promotion, protection and enforcement of IPR through the NCIPR;
3. Ensure speedy resolution of IPR related cases;
4. Strengthen the legal infrastructure on IP;

289. *See Id.*

290. *Id.* at 5-7.

291. *Id.* at 7.

292. Edmund Baranda & Ellen Rico, *Introducing the Philippines IP Action Plan 2017-2022*, ROUSE MAG. (Nov. 22, 2016), <http://www.rouse.com/magazine/news/introducing-the-philippines-ip-action-plan-2017-2022>.

5. Enhance the capabilities of enforcement agencies and personnel involved in IPR enforcement;
6. Intensify IP education initiatives; and
7. Establish strong presence in international fora.²⁹³

The new Action Plan focuses on strengthening the NCIPR's and IPOPHL's institutional arrangements with other law enforcement agencies, including the Bureau of Immigration to help in penalizing/deporting aliens violating IPR; the Bureau of Internal Revenue to investigate and pursue IPR violators with tax evasion cases; and the Anti-Money Laundering Council to pursue money-laundering investigations and prosecutions involving IP as a predicate crime.²⁹⁴

On the legislative front, the IPOPHL will propose and support amending existing laws to address issues brought about by e-commerce and digital platforms, and will "push for the inclusion of secondary liability for landlords and online intermediaries in cases of trademark violations; [t]he current law only provides for secondary liability in cases of copyright violations."²⁹⁵

"Another highlight of the PH Action Plan is to ensure speedy resolution of IP cases through continuing the capacity building program for judges, prosecutors and court attorneys to keep them abreast of developments in IP laws, rules and regulations," as well as making improvements in IPOPHL's own processes in hearing IP violation cases and disputes by conducting consultations with stakeholders in crafting revised regulations that will limit IP violation cases filed before the IPOPHL to two years.²⁹⁶

Finally, "the PH Action Plan looks to further promote IP rights protection in the Philippines and make it easier for IP owners to enforce their rights in the digital age."²⁹⁷ As with all ambitious plans, "these initiatives may take time to be put into action," but the its goals are admirable and will clearly lead to an improved and more effective IP administration and enforcement environment in the Philippines. The fact that the Philippines serves as the longest-standing ASEAN champion on IP enforcement initiatives is heartening as to the potential positive influence it has on regional enforcement initiatives and efforts.

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.*

3. Singapore: The Master Plan to be a Global IP Hub in Asia

“In April 2013, the Singaporean government accepted the recommendations of the IP Steering Committee” to adopt a Master Plan “to develop Singapore into a Global IP Hub in Asia.”²⁹⁸ “This 10-year master plan proposed strategies for developing a vibrant IP sector in Singapore by building capacities and infrastructure, and facilitating IP activities internationally and regionally.”²⁹⁹ Singapore specifically stated it aimed “to build a more harmonized and interoperable IP ecosystem” in ASEAN, and to raise Singapore’s profile as an indispensable center for IP-oriented businesses and enterprises doing business, not only in Singapore’s domestic market, but in ASEAN.³⁰⁰

In the intervening years, through an astute use of tax incentives and promotion, Singapore successfully attracted a wide range of IP-intensive industries, research and development (R&D), investments and operations, high technology sector investments, and the human resources and professionals that those investments entail.³⁰¹ The Intellectual Property of Singapore (“IPOS”) has astutely leveraged its expertise and reputation for quality in patent examination by entering into bilateral patent agreements with Cambodia and Laos that serve as a patent examination and issuance offices for them.³⁰² This enhanced regional role for IPOS in out-sourcing IP administration and examination functions for less developed offices likely will continue, fulfilling the goal of IPOS to, in effect, become the *de facto* patent office of ASEAN, while further harmonizing patent operations with other ASEAN national IP offices in the future.

Finally, in addition to becoming the Global IP Hub of Asia, Singapore has clearly established itself as a formidable regional and international player in commercial dispute resolution.³⁰³ The launch of the Singapore International Commercial Court in 2015, and the success of

298. See *Year In Review: Singapore as a Global IP Hub in Asia*, INTELL. PROP. OFF. OF SING., <https://www.ipos.gov.sg/Portals/0/Annual%20Report/2012-2013/yearinreview-a.html> (last visited Apr. 2, 2017).

299. *Id.*

300. *Id.*

301. See Catherine Jewell, *Singapore: a home for innovation*, WIPO MAG. 21 (Sept. 2012), http://www.wipo.int/wipo_magazine/en/2012/05/article_0004.html.

302. See generally *ASEAN Patent Examination Co-operation* <https://www.ipos.gov.sg/AboutIP/TypesofIP/WhatIsIntellectualProperty/Whatisapatent/Applyingforapatent/ASEANPatentExaminationCo-operationASPEC.aspx> (last updated Feb. 21, 2017).

303. *About the SICC*, SING. INT’L COMMERCIAL COURT, www.sicc.gov.sg/About.aspx?id=21 (last visited Apr. 15, 2017).

the Singapore International Mediation Centre, has underscored the role of Singapore in international commercial dispute resolution.³⁰⁴

4. Thai National Intellectual Property Roadmap and the Thailand 4.0 Digital Economy Initiative

In mid-2016, the Thailand National Intellectual Property Policy Committee (NIPPC), chaired by the Prime Minister, approved a 20-year IP roadmap for the country.³⁰⁵ This long term strategic plan “aims to reform the country’s entire IP system, in line with the value-based economy under the *Thailand 4.0* policy.”³⁰⁶ If completed, the roadmap should “enhance the competitiveness of Thai entrepreneurs and Thai products as they move into the global market and create trade opportunities.”³⁰⁷

Taking the position that Thailand has good potential in terms of IP competitiveness,³⁰⁸ the roadmap consists of both short-term and long-term plans, with six areas of focus: creation, protection, commercialization, enforcement, community IP, and national IP, including geographical indications, genetic resources, traditional knowledge, and traditional cultural expressions.³⁰⁹

However, the Thai Government recognizes that there are areas for improvement, most notably dealing with efficient IP administration, issuance, and registration by the Thai Department of Intellectual Property (DIP). It highlighted this when drawing attention to the need to significantly reduce the existing patent application backlog and reduce the average pendency rate for the issuance of patents and registration of trademarks.³¹⁰ Therefore, the DIP will implement work-sharing programs with other agencies and organizations, including universities, and adopt new procedures that speed up the examination process such as the ASEAN Patent Examination Cooperation program,³¹¹ a regional patent work-sharing program among ASEAN members, as well as hire and train

304. *Id.*

305. *Intellectual Property Roadmap for Thailand*, THE GOV'T PUB. REL. DEP'T OF THAI., www.thailand.prd.go.th/ewt_news.php?nid=4480&filename=index (last visited Apr. 2, 2017).

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

310. Jakkrit Kuanpoth, *The Department of Intellectual Property's IP Roadmap for Thailand*, TILLEKE & GIBBINS, (Aug. 25, 2016), <http://www.tilleke.com/resources/departement-intellectual-property-typ-ip-roadmap-thailand>. The current backlog at DIP at the end of 2016 of patent applications was almost 40,000, and more than 34,000 trademark applications.

311. *Id.*

more examiners, to increase the number of patent examiners and trademark examiners.³¹²

In connection to the promotion of IP commercialization and SMEs, and in addition to promoting innovation-oriented fairs organized by DIP and other government agencies, the Thai government stated its intention to establish an online Central IP Mart as a channel for buyers and entrepreneurs to meet and hold direct negotiations between the inventors and IPR holders for the licensing, leasing, or sale of IP.³¹³ In addition, the Government would expand its assistance and support for the establishment by local research institutions to establish technology licensing offices, and to assist them in conducting patent mapping and searches, and in the commercialization of patented inventions and license negotiations.³¹⁴

Additional Government plans include the development of a national data system center to link the relevant national agencies with an objective of national IP management.³¹⁵ Finally, the overall plan commits Thailand to the development and revision of its IP laws to meet international standards and best practices.³¹⁶

Regarding the issue of IPR enforcement and government commitment to eradicate widespread commercial-scale copyright piracy and trademark counterfeiting, the Ministry of Commerce has been designated to serve as the core agency in preventing and suppressing IP infringements, with an ambitious target to “eradicate the IP infringements in Bangkok and nearby provinces by 2021.”³¹⁷ Enforcement initiatives would include IP promotion before the general public; seeking cooperation from landlords and relevant agencies to adopt policies and take affirmative action against vendors and businesses engaging in the sale of illegal goods in shopping malls; and raising public awareness on health and safety.³¹⁸

C. Resolving Inevitable Disputes on Intellectual Property Issues

Even as the prospect of a greater harmonized IP regime throughout ASEAN becomes certain as a result of informed economic policy decisions, trade agreement compliance, increased demands by domestic

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.*

317. *Intellectual Property Roadmap for Thailand*, THE GOV'T PUB. REL. DEP'T OF THAI., http://thailand.prd.go.th/ewt_news.php?nid=4480&filename=index (last visited Apr. 2, 2017).

318. *Id.*

creative and innovative sectors, and the unavoidable push and pull of regional and global competition to attract foreign investment and develop sustainable, digital economies; the resolution of the inevitable disputes over IPR enforcement remains a daunting, and to date, unaddressed challenge in the ASEAN Economic Community.

Given that a bedrock principle and limitation governing the WTO dispute settlement process is that the mechanism can only be used between WTO Member States and only raised when a member state believes that an IP law or enforcement mechanism employed or adopted by another member state fails to comply with TRIPs, such a dispute settlement mechanism, not available to IPR holders, it has little practical effect in resolving disputes involving private IP matters in the AEC.³¹⁹

While some regional intergovernmental groupings have created supra-national or international courts of final appeal to resolve disputes among member states, such as the Andean Tribunal of Justice, Caribbean Court of Justice, East African Community Court, and the European Court of Justice,³²⁰ unlike the European Union, the AEC aspires only for economic and financial integration, without a monetary union or political integration. Such a clear limitation on the collective vision for an ASEAN Economic Community, indeed for ASEAN itself, has led to no effort to create common regional organs, such as a supra-national court of final appeal to resolve disputes between Member States, or the establishment of a common legislative body or executive leadership. Instead, ASEAN relies solely on consultation and consensus-driven outcomes. No agreement or treaty exists which subjects any ASEAN Member State to the final decision of a supra-national judicial body in a case interpreting or enforcing a domestic IP law.

Although ASEAN Member States have agreed to allow investors to submit claims against them in regional and international arbitration bodies to resolve certain types of disputes in limited commercial sectors,³²¹ some commenters have noted that while such an agreement “may provide some comfort to foreign investors in ASEAN, the development of regional and consolidated dispute resolution

319. *Understanding the WTO: Settling Disputes*, WORLD TRADE ORG., www.wto.org/english/thewto_e/whatis_e/tif_e/displ_e.htm (last visited Apr. 2, 2017).

320. See generally Karen J. Alter, *The Global Spread of European-Style International Courts*, NW. UNIV. BUFFETT CENTER FOR INT'L & COMP. STUD. WORKING PAPER SERIES (Jun. 2011).

321. *ASEAN Comprehensive Investment Agreement*, ASS'N OF SOUTHEAST ASIAN NATIONS, http://www.asean.org/storage/images/2013/economic/aia/ACIA_Final_Text_26%20Feb%202009.pdf (last visited Apr. 2, 2017) (signed on February 26, 2009, it applies only to investments in the manufacturing, agricultural, fishery, forestry, mining and quarrying sectors, and services incidental to those, although it could apply to other sectors as may be agreed to by ASEAN Members States).

mechanisms—like IPR protection—clashes against ASEAN values such as noninterference and national sovereignty and remains an ongoing goal.”³²²

In a not unlikely legal dispute, say, involving trademark protection or infringement, if the final appellate judicial body of one Member State rules one way in the matter, and another Member State’s final appellate judicial body rules differently in a similar case involving the identical trademark, there is no current mechanism to resolve the conflict despite the obvious desire to see the same trademark treated equally throughout a single market. Without creation of a supra-national judicial organ, IPR holders, be they owners or holders of patents, designs, or trademarks, are left to the uncertain mercy of individual national judicial bodies in protecting their IP within the AEC.

As renowned economists, Narongchai Akrasanee and Jutamas Arunanondchai, have noted, “While embracing all aspects of the EU institution is politically unfeasible and is unnecessary, a supra-national ASEAN Court is the one thing that the ASEAN economic integration process cannot do without.”³²³

IX. CONCLUSION

The region of Southeast Asia, encompassing ASEAN and the AEC, is a diverse, growing, and challenging environment for IPR holders. While the IP environment ranges from a minimal legal and archaic bureaucratic framework in Myanmar to a modern, rule of law-based and transparent legal system complemented by an array of adept and responsive agencies in Singapore, ASEAN as a whole is still, unfortunately, lesser than its parts.

To be sure, to date, ASEAN Member States have bridged their many differences of culture, geography, language, religion, history, and legal and political influences to create a functioning intergovernmental association within a single-market. Yet much remains to advance the harmonization of legal IPR regimes, administrative practices, and enforcement procedures. To achieve its stated goals, it is neither viable nor sustainable, let alone productive and efficient, for the AEC to be

322. *The ASEAN Economic Community: Investment Opportunities and Challenges in the World’s Newest Market*, JONES DAY (Feb. 2016), www.jonesday.com/files/Publication/ca71c5ab-9c8d-4384-a8a9-a123fbb83943/Presentation/PublicationAttachment/e78899ed-dd35-4cf1-9f01-af35c0b78348/ASEAN%20Economic%20Community%20Commentary%20A4.pdf.

323. NARONGCHAI AKRASANEE & JUTAMAS ARUNANONDCHAI, *Institutional Reforms to Achieve ASEAN Market Integration*, in *THE 2ND ASEAN READER*, eds. Sharon Siddique and Sree Kumar 509, 510 (Institute of Southeast Asian Studies, 2003).

forever at the mercy of ten separate legal systems, with ten national offices administering ten unharmonized IP regimes, requiring IP owners to comply with ten varying filing procedures and pay ten different sets of fees.

If a unified regime for the protection and enforcement of intellectual property is unlikely to be a reality at any time in the near future, and walking sideways is perhaps preferred to being taken in tow or pedaling in unison, then IP creators, inventors, innovators, and rights holders, at least for now, may prefer to see ASEAN, rather than acting as a meandering centipede, emulate a dexterous decapod crab,³²⁴ agilely ambling over rocky beaches toward a certain future.

324. For further discussion of the abilities of decapod crabs, *see, e.g.*, JUDITH S. WEIS, *WALKING SIDEWAYS: THE REMARKABLE WORLD OF CRABS* (Cornell Univ. Press, 4 (2012)).